FILED
MAR 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1663

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

~~GELDERMANN, INC., and~~
BOARD OF TRADE OF THE CITY OF CHICAGO,

Petitioners,

vs.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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March 21, 1988

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by inferring a Congressional intent to establish compulsory arbitration of common law claims, as mandated by Commodity Futures Trading Commission Regulation 7.201, based upon express legislative inaction at a time when Congress had full knowledge of the federal district court decision declaring Regulation 7.201 unconstitutional and could have unequivocally sanctioned the agency's construction but expressly did not do so?

2. Whether mere membership in a self regulatory organization whose rules expressly notify members that compulsory arbitration by non-members has been declared unconstitutional may rise to the level of the clear, knowing and intentional waiver of constitutional rights required by this Court?

3. Whether requiring arbitration of members' common law controversies with non-members violates the jury trial guarantees of the Seventh Amendment of the United States Constitution?

4. Whether the Court of Appeals erred in sanctioning Congressional authorization for the adjudication of Article III matters by a non-Article III forum, to the detriment of the institutional integrity of the courts and the separation of powers between the branches of government?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the Petitioners Board of Trade of the City of Chicago and Geldermann, Inc., and the Respondent Commodity Futures Trading Commission. Geldermann, Inc. will be filing a Petition for Writ of Certiorari on its own behalf.

Petitioner Board of Trade of the City of Chicago is a voluntary membership association created by special act of the legislature of the State of Illinois in 1859. The Board of Trade has no parent companies. The Board of Trade's affiliates are the MidAmerica Commodity Exchange and the Chicago Rice and Cotton Exchange. C-B-T Corporation is a wholly-owned subsidiary of the Board of Trade.

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COMMODITY FUTURES TRADING COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner Board of Trade of the City of Chicago respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on December 22, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 836 F.2d 310, and is reprinted in the appendix hereto, p. 1, *infra*.*

* References to the appendix in this petition will be indicated as follows: (App. p. ____, *infra*).

The memorandum opinion and order of the United States District Court for the Northern District of Illinois (Holdermann, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 27, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §1331, Geldermann, Inc. brought this suit in the federal court for the Northern District of Illinois against the Petitioner and Respondent. On December 30, 1986, the District Court granted Geldermann's motion for summary judgment against the Respondent. (App. p. 27, *infra*).

The Respondent appealed to the Seventh Circuit. Pursuant to Rule 24 of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 24 (F.R.Civ.P.), the Petitioner Board of Trade of the City of Chicago intervened as an appellee. The Seventh Circuit, on December 22, 1987, entered a judgment and opinion reversing the District Court's order and holding that the Commodity Exchange Act, 7 U.S.C. §1 *et seq.*, mandates submission to customer-initiated arbitration without violating Article III of the Constitution or implicating the Seventh Amendment (App. p. 1, *infra*). No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE, REGULATION AND RULE INVOLVED

7 U.S.C. §7a(11), Duties of contract markets

Each contract market shall provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: Provided, That (i) the use of such procedure by a customer shall be voluntary and (ii) the term "customer" as used in this paragraph shall not include another member of the contract market.

17 C.F.R. §7.201 and Board of Trade of the City of Chicago Rule 620.01(B), Customer Claims and Grievances

The Arbitration Committee and Mixed Panels constituted pursuant to Regulation 620.02 have jurisdiction to arbitrate all Customers' Claims and Grievances against any member or employee thereof which have arisen prior to the date the customer's claim is asserted. If the customer elects to initiate an arbitration proceeding of any customer claim or grievance, the member shall submit to arbitration in accordance with these Arbitration Rules and Regulations. The arbitration shall be initiated by delivery to the Administrator of (a) a Statement of Claim and a "Chicago Board of Trade Arbitration Submission Agreement for Customer's Claims and Grievances" signed by the customer or (b) a Statement of Claim and another arbitration agreement between the parties, which agreement conforms in all respects with any applicable requirements prescribed by the Commodity Futures Trading Commission. The refusal of any member or employee to sign the "Chicago Board of Trade Arbitration Submission Agreement for Customer's Claims and Grievances" shall not deprive the Arbitration Committee or a Mixed Panel constituted

pursuant to Regulation 620.02 of jurisdiction to arbitrate customers' claims under these Arbitration Rules and Regulations. The Committee and Mixed Panels have jurisdiction to arbitrate a counterclaim asserted in such an arbitration, but only if it arises out of the transaction or occurrence that is the subject of the customer's claim or grievance and does not require for adjudication the presence of essential witnesses, parties or third persons over whom the Association does not have jurisdiction. Other counterclaims are subject to arbitration by the Committee, or a Mixed Panel, only if the customer agrees to the submission after the counterclaim has arisen.

STATEMENT OF THE CASE

Geldermann, Inc. ("Geldermann") and the Board of Trade of the City of Chicago ("Board of Trade" or "Exchange") are challenging here the constitutionality of Commodity Futures Trading Commission ("CFTC" or "Commission") Regulation 7.201, 17 C.F.R. §7.201. A necessary predicate to understanding this current action between the parties is an appreciation of past disputes between the Exchange and the Commission over the legality of Regulation 7.201. Therefore, the circumstances leading to the institution of the instant case will be put in their historical context initially, and the discussion of Geldermann's involvement will follow.

The CFTC is an independent federal agency established pursuant to the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. §1 *et seq.*, to provide federal regulatory oversight to the Board of Trade and other self-regulatory commodity futures exchanges, also known as contract markets. The Commission is empowered to institute rules

and regulations to effectuate the purposes of the Act, 7 U.S.C. §12a(5), and to alter the rules of a contract market, 7 U.S.C. §12a(7).

Section 5a(11) of the Act, 7 U.S.C. §7a(11), requires the Exchange to:

> . . . provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: Provided, that (i) the use of such procedure by a customer shall be voluntary and (ii) the term "customer" as used in this paragraph shall not include another member of the contract market. . .

In compliance with §5a(11), the Board of Trade proposed Rule 620.01(B) calling for voluntary arbitration by its members of customer-initiated claims. The CFTC evolved a contrary interpretation of §5a(11) and adopted Regulation 7.201 to rewrite Exchange Rule 620.01(B), effectively requiring compulsory arbitration of customer claims against Exchange members. (The text of Regulation 7.201 and Rule 620.01(B) is reprinted at p. 3, *supra.*) The Exchange brought suit against the Commission to void Regulation 7.201 as well as its own Rule 620.01(B), in the case of *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, No. 81 C 7175, slip op. (N.D. Ill. April 23, 1982) (hereinafter "*CBT v. CFTC*").

In *CBT v. CFTC*, the Board of Trade claimed that the Commission acted arbitrarily in promulgating Regulation 7.201 because the Commission wrongly believed that Section 5a(11) of the CEA required compulsory arbitration. The Exchange also contended that mandatory arbitration deprived Exchange members of their Seventh Amendment right to a jury trial. The Commission defended the

suit by claiming that the Exchange lacked standing, that the lawsuit did not present "ripe" issues, and that the Seventh Amendment did not apply to claims subject to compulsory arbitration.

The District Court in *CBT v. CFTC* entered judgment for the Board of Trade and permanently enjoined the CFTC from enforcing Commission Rule 7.201 by holding that the rule violated the Seventh Amendment in compelling Exchange members to arbitrate common law legal claims. The Court further found that the Act did not require the CFTC to adopt a mandatory arbitration rule.

On appeal, the Seventh Circuit reversed solely on grounds of ripeness by holding that neither the Board of Trade nor its members had suffered harm from the CFTC regulation and that the case lacked a "specific factual context." *CBT v. CFTC*, 704 F.2d 929 (7th Cir. 1983). Furthermore, the Court of Appeals wrote that the CFTC might "choose not to apply its rule" when presented with a particular customer demand for arbitration and concluded that it could not decide, in the case before it, whether the CFTC regulation violated the Seventh Amendment.

Since the Court of Appeals' decision in *CBT v. CFTC*, the Board of Trade's rulebook has contained the following footnote to Rule 620.01(B):

> The legality of Rule 7.201 and thus the obligation of Board of Trade members to arbitrate customers' claims and grievances, has been the subject of litigation between the Board of Trade and the CFTC. In 1982, the United States District Court for the Northern District of Illinois declared the Rule invalid, holding that CFTC Rule 7.201 is an unconstitutional denial of the right to a jury trial. However, on April 5, 1983, the Seventh Circuit Court of Appeals held that the case was not yet "ripe" for adjudication. While the Court did not rule on the merits, the Court went

> on to say: "Moreover, the Board need not flout the rule in order to challenge its validity. A member or employee ordered by the Board or the Commission to arbitrate under Rule 7.201 could simply bring a suit to enjoin arbitration or to enjoin enforcement of an arbitration award against him on the ground that the Commission's rule requiring arbitration is invalid.

This history is a necessary predicate to the current dispute.

Geldermann is a commodity futures brokerage firm registered with the CFTC as a Futures Commission Merchant ("FCM") under §4d(1) of the CEA, 7 U.S.C. §6d(1), and a member of the Board of Trade. As a registered FCM, Geldermann may solicit and accept customer orders for the purchase or sale of commodity futures and options.

FSI Futures, Inc. ("FSI") was a Geldermann customer and regularly traded commodity futures on the Board of Trade through its account with Geldermann. In April, 1985, FSI asserted a claim in arbitration against Geldermann for Geldermann's failure to fill a purchase order. Geldermann elected to arbitrate the claim which was heard before a Board of Trade arbitration panel. The panel awarded FSI $54,718. Shortly after the arbitration Geldermann terminated its relationship with its customer with the request that FSI immediately transfer all of its open positions to another firm. FSI objected to the commissions charged by Geldermann upon the transfer of FSI's open positions and filed another exchange arbitration claim against Geldermann for money damages, plus interest, under the provisions of CFTC Regulation 7.201 and Exchange Rule 620.01(B).

Geldermann responded to FSI's arbitration claim by instituting this action against the CFTC, the Board of Trade and FSI, in the federal court for the Northern District of Illinois, pursuant to 28 U.S.C. §1331. Geldermann asserted that FSI's claims were common law actions and,

therefore, they should be tried in the District Court by a jury pursuant to Article III of the United States Constitution and the Seventh Amendment.

The District Court ruled in Geldermann's favor and held that Commission Regulation 7.201 and Board of Trade Rule 620.01(B) violated Geldermann's Seventh Amendment right to a trial by jury. The District Court also permanently enjoined and restrained the CFTC from requiring Geldermann to arbitrate FSI's claims (App. p. 39, *infra*). Although it acknowledged the strength of Geldermann's Article III challenge, the court did not base its decision on this argument (App. p. 37, *infra*).

Invoking the jurisdiction of the United States Court of Appeals for the Seventh Circuit under 28 U.S.C. §1291, the CFTC appealed naming Geldermann as the only appellee. The Board of Trade concurred with the District Court's decision and chose not to appeal. However, the Exchange intervened as an appellee pursuant to Rule 24 of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 24 (F.R.Civ.P.), because of its interest as an original party to the underlying action and due to the fact that virtually all of its members share Geldermann's interest in objecting to compulsory arbitration through the imposition of CFTC Regulation 7.201. FSI was not a party to the action before the Seventh Circuit.

The Seventh Circuit addressed the dispute as whether the CEA compels the Commission to promulgate rules requiring commodity exchange members to submit to customer-initiated arbitration, and, if so, whether such a mandate violates Article III of the United States Constitution or the Seventh Amendment (App. p. 1, *infra*).

On the first point, the Seventh Circuit stated that §5a(11) of the Act requires Exchange members to submit to arbitration by virtue of CFTC Regulation 7.201, and that con-

siderable weight should be accorded to the Commission's construction of the Act which it is entrusted to administer (App. p. 9, *infra*). The Seventh Circuit premised its position by finding that Congress twice amended the CEA since the Commission's promulgation of Regulation 7.201 without overturning the CFTC, and that in 1978 Congress noted that it was not altering the Commission's interpretation that exchange members submit to customer arbitration (App. p. 10, *infra*).

The Petitioners asserted below that §5a(11) of the CEA, CFTC Regulation 7.201 and Board of Trade Rule 620.01(B) all violate Article III of the U.S. Constitution because Geldermann is forced to submit to the resolution of common law customer claims against it without the tenure and salary protections accorded to judges under Article III. The Seventh Circuit dismissed this contention by finding that Geldermann waived its right to an Article III forum by consenting to submit to arbitration (App. p. 12, *infra*). Geldermann was deemed to have waived its constitutional guarantee because it voluntarily became a member of the Board of Trade, despite the virtual economic necessity of such membership for a firm like Geldermann, thereby agreeing to be bound by the compulsory arbitration provisions of Exchange Rule 620.01(B) (App. pp. 12-15, *infra*).

The Seventh Circuit also addressed the constitutional checks and balances embodied in Article III which may be implicated to overrule the consent of a party (App. p. 21, *infra*). In this regard, the Court found that mandatory arbitration did not threaten the structural integrity of the courts or the separation of powers between the branches of government because the Congressional scheme of allowing commodity customers the option of electing arbitration is not an undue intrusion on the province of the judiciary (App. pp. 22-25, *infra*).

Finally, the Seventh Circuit determined that because Geldermann was not entitled to an Article III forum for the adjudication of its claims, the Seventh Amendment right to trial by jury was not implicated (App. p. 26, *infra*). Accordingly, the Seventh Circuit reversed the District Court's decision enjoining enforcement of CFTC Regulation 7.201 (App. pp. 2 and 26, *infra*).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN RELYING ON EXPRESS LEGISLATIVE INACTION AS EVIDENCE OF CONGRESSIONAL INTENT TO REQUIRE COMPULSORY ARBITRATION OF COMMON LAW CLAIMS WHEN CONGRESS WAS FULLY AWARE THAT MANDATORY ARBITRATION HAD BEEN DECLARED UNCONSTITUTIONAL AND EXPRESSLY CHOSE NOT TO ALTER THAT JUDICIAL DETERMINATION.

In finding that the CEA compels Geldermann and other commodity exchange members to submit to customer-initiated arbitration, the Court of Appeals claims that the District Court erred by failing to accept the Commission's interpretation of §5a(11) as articulated in Regulation 7.201. Specifically, the Seventh Circuit stated that the District Court erred in failing to give sufficient weight to *Chevron U.S.A., Inc. v. Natural Resources Council, Inc.*, 467 U.S. 837 (1984), and this Court's statement "that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." 467 U.S. at 844 (App. p. 9, *infra*). The District Court also is criticized for not correctly analyzing the legislative history of the CEA in reaching its decision (App.

p. 10, *infra*). The Seventh Circuit found the legislative history to support the Commission's interpretation of §5a(11). In reaching this conclusion, the Court of Appeals cites to the fact that Congress has twice amended the CEA since the enactment of Regulation 7.201 without overturning the Commission (App. p. 10, *infra*). The Seventh Circuit's construction is, however, fatally flawed.

Initially, whatever degree of weight should be given an agency's statutory interpretation, the agency cannot simply abrogate constitutionally guaranteed rights especially where, as here, there is no clear Congressional intent that the agency do so. The *Chevron* decision itself states that:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the Court determines Congress has not directly addressed the precise question at issue . . . the question for the Court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842.

Here, as demonstrated, *infra*, Congressional intent was expressly *neutral* in the face of a judicial determination that the CFTC's imposition of compulsory customer arbitration is unconstitutional. Therefore, deference to an agency interpretation becomes irrelevant, and the relevant judicial inquiry becomes whether the agency action is a permissible construction. This was precisely the inquiry of the District Court which held Regulation 7.201 unconstitutional.

The Court of Appeals clearly erred when it interpreted Congress' inaction with respect to §5a(11) as support for Regulation 7.201 and the CFTC's interpretation. In amending the CEA during the 1982 re-authorization of the Commission, Congress was made fully aware of the District Court's decision in *CBT v. CFTC* that Regulation 7.201 is unconstitutional (App. p. 6, *infra*). The Seventh Circuit mistakenly focuses upon the limited Congressional statement that the 1982 amendments "[d]o not affect . . . the Commission's understanding that exchange members must participate in arbitration proceedings which the customer has elected to pursue." H.R. Rep. No. 565, 97th Cong., 2d Sess. 56 (1982). However, reliance upon this statement in isolation from the rest of the record is totally misleading.

Clearly, Congress' knowledge of the District Court's decision, coupled with its inaction despite the knowledge of that decision, cannot be inferred as support for the Commission's construction of §5a(11). To the contrary, it must be construed as evidence that Congress was satisfied with the District Court's determination as to the unconstitutionality of Regulation 7.201 and chose not to disturb that ruling. Had Congress felt otherwise (as the Seventh Circuit concluded), Congress easily could have removed any doubt by expressly amending §5a(11) to specifically require that all customer claims must be arbitrated. They explicitly declined to do so.

Despite acknowledging the "Commission's understanding", it remains undisputed that Congress took no action either to remedy the District Court's ruling or to validate the CFTC's interpretation by amending §5a(11). Such inaction cannot now be interpreted by the Seventh Circuit as Congress' concurrence with Commission Regulation 7.201. Congress' inaction merely indicates that it was cognizant of the dispute between the CFTC and the Ex-

change and the judicial determination that the agency's position is invalid, and that it chose to take no position with respect to the Commission's interpretation and the judicial rejection of that interpretation. Thus, the legislative history shows that Congress expressly approved the status quo, which was the unconstitutionality of Regulation 7.201 as declared by the District Court in *CBT v. CFTC*.

The Court of Appeals also points out that Congress amended the CEA in the Futures Trading Act of 1986 without altering the CFTC's construction of §5a(11) (App. p. 10, n. 7, *infra*). Congressional inaction here does not equate to approval of CFTC Regulation 7.201; instead it again indicates Congress' refusal to alter the status quo. The situation in 1986 was that the Court of Appeals had reversed the district court's decision in *CBT v. CFTC*, but only on ripeness grounds, and with favorable comment as to the questionable constitutionality of Regulation 7.201 (App. p. 2, *infra*). Moreover, Congress had before it in the 1986 reauthorization record the report of the National Futures Association ("NFA"), the industry wide self-regulatory body it created in 1982. NFA has a nationwide mandatory arbitration program available to commodity futures customers. National Futures Association Manual, Code of Arbitration, §6017.1(a). Thus, the only logical inference is that Congress felt the combination of NFA arbitration and CFTC reparations actions negated any necessity to overrule the judicial determination that compulsory customer arbitration at the Board of Trade is unconstitutional.

It is obvious that Congress said and did nothing to validate or support the CFTC imposition of compulsory customer arbitration. This inaction can only be inferred as an express Congressional intent to remain neutral in the battle over the constitutionality of Regulation 7.201 and accept the judicial determination that mandatory customer

arbitration is unconstitutional. If Congress supported the Commission's interpretation, it would have expressly made this known simply by amending §5a(11) in plain english to comport with Regulation 7.201. Clearly, the Seventh Circuit's deference to the Commission's interpretation of §5a(11) and its reliance on the legislative history to support this interpretation is misplaced and erroneous.

II.

ABSENT GELDERMANN'S CLEAR, KNOWING AND INTENTIONAL WAIVER OF ITS CONSTITUTIONAL RIGHT TO HAVE COMMON LAW DISPUTES HEARD BEFORE AN ARTICLE III FORUM, THE SEVENTH CIRCUIT IMPROPERLY INFERRED A WAIVER OF THIS RIGHT MERELY BECAUSE GELDERMANN MAINTAINED ITS MEMBERSHIP AT THE BOARD OF TRADE.

The Seventh Circuit determined that Geldermann waived its constitutional right to have FSI's common law claims adjudicated before a jury in an Article III court. This decision is not only contrary to the largely undisputed facts of the case, but fails to conform to the law articulated by this Court.

Neither the Board of Trade nor Geldermann have ever consented to the constitutionality of the mandatory arbitration provision at issue in this case. The Board of Trade's unceasing opposition to the mandatory arbitration provision is evidenced by the following footnote in its rulebook to Regulation 620.01(B):

> The legality of Rule 7.201, and thus the obligation of Board of Trade members to arbitrate customer's claims and grievances, has been the subject of litigation between the Board of Trade and the CFTC. In 1982, the United States District Court for the Northern District of Illinois declared the Rule invalid, holding that CFTC Rule 7.201 is an unconstitutional denial of the right to a jury trial. However, on April 5,

> 1983, the Seventh Circuit Court of Appeals held that the case was not yet "ripe" for adjudication. While the Court did not rule on the merits, the Court went on to say: "Moreover, the Board need not flout the rule in order to challenge its validity. A member or employee ordered by the Board or the Commission to arbitrate under Rule 7.201 could simply bring a suit to enjoin arbitration or to enjoin enforcement of an arbitration award against him on the ground that the Commission's rule requiring arbitration is invalid.

Notwithstanding the clear intent of both the Exchange and Geldermann not to consent to the constitutionality of CFTC Regulation 7.201, the Seventh Circuit concluded that Geldermann waived its personal guarantees under Article III and reversed the decision of the District Court. In doing so, the court examined a line of cases which define narrow exceptions to this fundamental right and incorrectly applied them in the instant case.

Relying on *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Seventh Circuit erroneously concluded that voluntary membership at the Board of Trade divested Geldermann of its constitutional right to an Article III forum. *Thomas* involved a mandatory arbitration scheme designated by the Environmental Protection Agency ("EPA") to resolve compensation disputes concerning data submitted to the EPA under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). The narrow issue in *Thomas* was "whether Article III of the Constitution prohibits Congress from selecting binding arbitration . . . as the mechanism for resolving disputes among participants in FIFRA's pesticide scheme." *Id.* at 572. The Court found that under the extremely narrow circumstances presented in *Thomas*, and the highly involved administrative proceedings in that industry, binding arbitration was appropriate. Furthermore, the *Thomas* registrants explicitly consented to have their rights determined by arbitration. *Id.* at 585.

Unlike *Thomas*, Geldermann never consented to mandatory arbitration. To the contrary, the firm was aware of and relied upon a footnote in the Board of Trade rulebook which apprised the Exchange membership that the Northern District of Illinois had declared Regulation 7.201 unconstitutional. The notice in the rulebook further advised Geldermann and other Exchange members that the Seventh Circuit subsequently determined that the issue before the District Court was not ripe for adjudication, but that a member ordered to arbitrate pursuant to Rule 620.01(B) could again challenge the validity of Regulation 7.201. In reliance upon the prior judicial rulings as noted in Exchange rules, Geldermann did challenge the constitutionality of Regulation 7.201 after it was forced to arbitrate a customer complaint based upon common law claims.

Geldermann's reliance on the District Court and Seventh Circuit's decisions in *CBT v. CFTC*, and the footnote to Exchange Rule 620.01(B), simply cannot be construed as a knowing, intentional and voluntary waiver of its Article III rights. First, the only judicial determination on the merits of the CFTC-imposed regulation declared the mandatory arbitration scheme unconstitutional. Second, Geldermann reasonably relied on the Court of Appeals' decision and the Exchange rulebook for extending the opportunity to litigate this issue. Given these circumstances, the Seventh Circuit clearly misapplied *Thomas* to this case.

Thomas is also distinguishable because the plaintiff there did not raise the Seventh Amendment argument of a right to trial by jury from which a waiver could be interpreted, nor did this Court base its decision on plaintiff's waiver of an Article III right by registering under FIFRA. Moreover, the case now before the Court is

based on a common law dispute, not a statutorily created right as found in *Thomas*.

Furthermore, the Seventh Circuit held that by its continued voluntary association with the Board of Trade, Geldermann consented to the resolution of claims against it in a customer-initiated arbitration proceeding. The Court made the astounding suggestion that Geldermann could have resigned its membership at the Exchange to preserve its Article III right because such action "is not such an extreme order to retain a constitutional right." (App. p. 18, n. 9, *infra*).

The Court's rationale would compel Geldermann to surrender a substantial part of its livelihood in order to preserve a constitutional claim. This dilemma was clearly understood by the District Court in light of its appraisal of an affidavit from Kevin Mack, President of Geldermann. Mr. Mack stated that on the basis of customer balances, Geldermann reputedly is the largest U.S. commodity brokerage firm. Most of this business derives from large commercial accounts which trade on the Exchange through Geldermann because of the benefits conferred in being a member of the Board of Trade. These benefits are an active presence on the Exchange floor and in the trading pits. Access to the trading floor and pits is an invaluable, exclusive source of market information and its integration in the price discovery auction process. A floor presence also is essential in order for Geldermann to meet its customers' demands for rapid order execution where large positions in volatile markets pose enormous financial risk. Without its Board of Trade membership, Geldermann simply could not execute buy and sell orders with the speed and price advantage necessary to retain its customer base in an extremely competitive industry.

The Seventh Circuit clearly erred in conditioning the exercise of constitutional rights on the sacrifice of one's economic viability. Taken to its legal conclusion, no right guaranteed under the constitution could be protected from infringement unless the injured party would be willing to sacrifice its livelihood. For example: if a state were to require that any attorney/client fee dispute must be submitted to arbitration, the Seventh Circuit's logic would dictate that an attorney's only resource would be to surrender his or her license to practice law; any challenge would be deemed to have been "waived" by continuing to practice law after the unconstitutional requirement had been instituted. Such a result is incredible and incorrect. Yet this is the choice given to Geldermann by the Court of Appeals. Geldermann's economic necessity in remaining a Board of Trade member simply cannot be construed as the intentional, knowing or voluntary waiver of Article III rights required by this Court.

The Seventh Circuit also determined that Geldermann waived its Article III rights and consented to the application of Regulation 7.201 merely because it had previously consented to arbitrate a claim at the Board of Trade (App. p. 19, *infra*). In support of this position the Seventh Circuit relied upon *Commodity Futures Trading Commission v. Schor, et al.*, ____ U.S. ____, 106 S. Ct. 3245 (1986). In *Schor*, respondents filed separate reparations complaints with the CFTC against petitioner (a commodity futures broker). The broker thereafter filed a diversity action in federal district court against the respondents. Respondents then moved to dismiss the action on the ground that the reparations proceeding would resolve all rights of the parties. *Id.* at 3251. The CFTC found against the respondent and in favor of the broker; the Commission also granted the broker the damages alleged in the counterclaim initially filed in federal court. Only after

respondents lost at the Commission (and after agreeing that all rights would be resolved before the CFTC) did the respondents seek to challenge the Commission's authority.

Schor is easily distinguished from the instant case. The first arbitration filed at the Exchange came about when FSI asserted a claim against Geldermann for its failure to fill a purchase order in April, 1985. Geldermann agreed to arbitrate the claim at the Exchange and Geldermann was ordered to pay $54,718 to FSI. Thereafter, Geldermann requested that FSI terminate its business relationship with the firm and requested that FSI make immediate arrangements to transfer all open positions to another clearing firm. In doing so, another dispute arose which is the foundation of this case. At no time did Geldermann agree to arbitrate the second claim before an Exchange arbitration panel. Merely because the firm elected to arbitrate one claim does not mean that it agreed to submit all subsequent disputes for resolution before the same panel. Moreover, *Schor* was a CFTC reparations proceeding which must be premised upon a violation of the CEA. 7 U.S.C. §18. Geldermann's second dispute with FSI is clearly a simple case of contract law and monetary damages; common law issues not governed by *Schor*.

III.

THE COURT OF APPEALS INCORRECTLY DENIED GELDERMANN'S SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY OF COMMON LAW CLAIMS.

The Board of Trade and Geldermann have steadfastly maintained that the claims asserted against Geldermann are clearly subject to the Seventh Amendment guarantee of a trial by jury. It is elementary that the Constitution guarantees the right to trial by jury "in suits at common

law." U.S. Const., Amend. VII. Furthermore, where the claim or right asserted entitles one to a money judgment customarily granted by a court of law, this is the type of relief to which a trial by jury applies. *See, Dairy Queen v. Wood*, 369 U.S. 469, 477-8 (1962). Because the claims asserted against Geldermann, sounding in debt, contract and conversion, are of a kind traditionally tried at common law for money damages, compelling Geldermann to arbitrate such claims would blatantly violate its Seventh Amendment right to a jury. *See, Ross v. Bernhard*, 396 U.S. 531 (1970).

As the District Court noted, when the Constitutional right to jury trial is waived, it can only be done knowingly, intentionally and voluntarily. *Leasing Service Corp. v. Crane, et al.*, Nos. 85-1679, 85-1755, slip op. (4th Cir. 1986); *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977); *Rocco Ferrera & Co., Inc. v. G.H.A. Lockjoint, Inc.*, No. 85-7186, slip op. (N.D. Ill. October 11, 1985). Also, courts are to construe narrowly a waiver of Seventh Amendment rights and are to indulge in every reasonable presumption against waiver. *See also, Beacon Theater, Inc. v. Westover*, 359 U.S. 512 (1959); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

In reaching its decision, the District Court referred to the footnote to Rule 620.01(B) in holding that:

> . . . while the disclaimer notified Geldermann of the mandatory arbitration scheme in Regulation 7.201 and CBT Rule 620.01(B), the disclaimer did not make clear that, if Geldermann accepted CBT membership, Geldermann would waive its Seventh Amendment rights. Rather, the disclaimer suggested that a court would again invalidate the regulation when a member challenged it in the proper procedure. Geldermann did not, in these circumstances, knowingly and intentionally waive its Seventh Amendment right (App. p. 34, *infra*).

Although the Seventh Court reversed the District Court's decision, it did not directly address this issue. Rather, the Appellate Court found that because Geldermann had waived its right to an Article III forum the Seventh Amendment was not implicated (App. p. 26, *infra*). As articulated above, however, the Seventh Circuit's decision is clearly erroneous in finding a waiver by Geldermann of its Article III rights. Therefore, the Seventh Amendment is acutely implicated to ensure Geldermann's constitutional protections by means of a jury trial on FSI's common law claims.

IV.

THE COURT OF APPEALS ERRED IN UPHOLDING CONGRESSIONAL AUTHORIZATION FOR THE ADJUDICATION OF ARTICLE III MATTERS IN A NON-ARTICLE III FORUM, THEREBY TRANSGRESSING THE INSTITUTIONAL INTEGRITY OF THE COURTS AND THE SEPARATION OF POWERS BETWEEN THE BRANCHES OF GOVERNMENT.

The purpose of Article III of the United States Constitution is to ensure that the judicial power should be entrusted only to those judges whose impartiality and freedom from coercion are ensured by life tenure, subject only to impeachment, and by irreducible compensation. *Wimmer v. Cook*, 774 F.2d 68 (4th Cir. 1985).

Although constitutional guarantees may be waived, Article III implicates the separation of powers between the branches of government, therefore, notions of consent and waiver are not controlling because the guarantees of Article III serve institutional interests that the parties cannot be expected to protect (App. p. 22, *infra*, citing *Commodity Futures Trading Commission v. Schor, et al.*, ____ U.S. ____, 106 S. Ct. 3245 (1986)). However, this Court "has long recognized that Congress is not barred from acting

pursuant to its powers under Article I to vest decision making authority in tribunals that lack the attributes of Article III courts." *Thomas v. Union Carbide Agricultural Products, Co.*, 473 U.S. 568, 583 (1985). Although the CFTC has sought to rely on this language in arguing for the constitutionality of Regulation 7.201, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), stands for the proposition that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review. 458 U.S. at 84.

Therefore, a significant issue here concerns the adjudication of "public" rights versus "private" rights, as articulated in *Thomas* and *Northern Pipeline*, and the structural protections of Article III. Clearly, the Seventh Circuit misconstrued Geldermann's rights in the instant case and dealt a blow to the institutional integrity embodied in Article III.

"Public" rights have been defined as those "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Northern Pipeline*, 458 U.S. at 67-68 (1982), citing *Crowell v. Benson*, 285 U.S. 22, 50 (1932). "Private" rights consist of "the liability of one individual to another under the law as defined." 458 U.S. at 69-70.

The Court of Appeals has glossed over the distinction between the resolution of disputes involving individuals or entities subject to an agency's regulatory scheme, in the context of administrative proceedings which arguably do involve the adjudication of "public" rights and to which the right to a jury trial does not attach, and the situation presented here of compelling only one of two parties

to arbitrate, thereby denying one party of its constitutional rights in connection with resolving traditional common law claims ("private" rights). The *Thomas* decision clearly emphasizes that where private rights are involved, those rights should be protected from encroachment by the Government. *Thomas*, 473 U.S. at 583, citing *Northern Pipeline*, 458 U.S. at 70-71 and n. 25.

In *Thomas*, FIFRA created arbitration where none had existed before, narrowly limited to a specific type of dispute between individuals or entities, all of which were subject to the EPA's regulatory structure. In contrast, §5a(11) does not create a new right but simply establishes a forum for resolving the common law claims asserted against Geldermann. In addition, arbitration or similar procedures for resolving customer disputes were in existence at many exchanges long before the CFTC was formed.* Although exchange arbitration involves futures transactions which may be subject to CFTC regulation, the CFTC does not participate in any way in an actual arbitration between the two private parties. Moreover, an arbitration tribunal does not make formal findings of violative conduct, but rather renders awards of monetary damages just as in civil litigation subject to an Article III forum.

The Court of Appeals also incorrectly cites to *Schor* in support of its argument that common law claims (private rights) may be adjudicated before a non-Article III tribunal. In *Schor*, this Court found that the Commission's jurisdiction over common law counterclaims, asserted in

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* Hearings before the House Committee on Agriculture on Review of Commodity Exchange Act and Discussion of Possible Changes, 93rd Cong., 1st Sess., at 97 (Comments of the Board of Trade of Kansas City), at 118 (Comments of the Commodity Exchange, Inc.), at 131 (Comments of the Chicago Board of Trade), at 138 (Comments of the New York Cotton Exchange), at 165 (Comments of the New York Mercantile Exchange).

a CFTC reparations proceeding, did not violate Article III. But *Schor* is analogous to *Thomas* and easily distinguishable from the instant case because in contrast to common law claims which are often asserted in a CBOT arbitration proceeding, reparations actions under Section 14 of the Act, 7 U.S.C. §18, must involve a violation of the CEA or Commission regulations. In fact, Section 14 of the CEA specifically mandates that a complaint in reparations must allege a violation of the Act. Furthermore, Congress unequivocally prescribed that reparations is compulsory for CFTC registrants, whereas Congress did not articulate the same mandate for commodity exchange members subject to customer-initiated claims.

It must be emphasized that the structural protections of Article III are severely threatened by an arbitration scheme which precludes Geldermann and other Exchange members from even having the option to forego an Article III forum. Removing a party's discretion to consent to CFTC arbitration, absent a knowing or voluntary waiver of Article III rights, is an encroachment upon the separation of government powers which should not be tolerated.

In addition, the Board of Trade strenuously objects to the Court of Appeals' cavalier assertion that because Geldermann is not entitled to an Article III forum, the Seventh Amendment is not implicated. Obviously, that argument begs the issue of whether the CFTC's imposition of mandatory arbitration is permissible and proper. Exchange members' disputes with customers frequently involve simple common law actions for monetary damages with no dependence upon the federal scheme of regulation of futures transactions.* In these instances, Exchange

* For example, customer actions against commodity brokers for breach of contract have been specifically recognized as "suits at

(Footnote continued on following page)

members must be allowed to exercise their Seventh Amendment rights and have such claims tried to a jury if they so choose.

Section 5a(11) of the Act was designed to offer an efficient and expeditious alternative to court action or statutory recovery procedures for both customers and the commodity firms with which they deal. H.R. Rep. No. 93-975, 93rd Cong., 2d Sess. (1974). Obviously, arbitration need not be a mandatory procedure in order to be a useful dispute resolution process for commodity customers. More often than not, Exchange members voluntarily agree to arbitration because of its traditional advantages, such as the speedy resolution of disputes by experts in the field at significant savings. The Board of Trade, however, strongly opposes mandatory arbitration when a member, like Geldermann, asserts its constitutional rights.

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* *continued*

common law" entitling the parties to a jury trial. *Arkoosh v. Dean Witter & Co., Inc.*, 415 F. Supp. 535 (D. Neb. 1976). Other claims that CBOT members are likely to be forced to arbitrate under the CFTC's regulation are also legal in nature, involving such traditional common law issues as fraud, *Halladay v. Verschoor*, 381 F.2d 100, 108-09 (8th Cir. 1967); negligence, *Ransom v. Staso Milling Co.*, 2 F.R.D. 128, 131 (D. Vt. 1941); breach of fiduciary duty, *Dixon v. Northwestern Nat'l. Bank of Minneapolis*, 297 F. Supp. 485 (D. Minn. 1969); and violation of an agency duty, *Bradshaw v. Thompson*, 454 F.2d 75, 79 (6th Cir. 1972), *cert. denied*, 409 U.S. 878 (1972).

CONCLUSION

This petition raises significant and compelling reasons for this Court to exercise its discretion to review the Court of Appeals' decision. Therefore, the Board of Trade of the City of Chicago prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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March 21, 1988

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1312

GELDERMANN, INC.,

Plaintiff-Appellee,

and

BOARD OF TRADE OF THE CITY OF CHICAGO,

Intervening-Appellee,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 07350—**James F. Holderman,** *Judge.*

ARGUED SEPTEMBER 18, 1987—DECIDED DECEMBER 22, 1987

Before BAUER, *Chief Judge,* CUMMINGS and POSNER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* The question presented by this appeal is whether the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. § 1 *et seq.,* dictates that the Commodity Futures Trading Commission ("CFTC" or "Commission") promulgate rules requiring commodity exchange members to submit to customer-initiated arbitration, and, if so, whether such a requirement violates Ar-

ticle III of the United States Constitution or the Seventh Amendment. We hold that Congress, through the CEA, intended to require mandatory submission to customer-initiated arbitration and that this requirement does not violate Article III or implicate the Seventh Amendment.

I. *Commodity Exchange Act Requires Arbitration of Claims of Customer Seeking That Remedy.*

Although this case arises in its current form between Geldermann, Inc. ("Geldermann"), a commodity brokerage firm, and the CFTC, it is the latest action in the ongoing dispute between the Chicago Board of Trade ("CBOT") and the CFTC regarding the mandatory submission of CBOT members to customer-initiated arbitration proceedings.[1] In fact, the CBOT raised precisely the same issue before this Court in *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, 704 F.2d 929 (7th Cir. 1983) (hereinafter "*CBOT v. CFTC*"). At that time, however, we determined that the issue was not yet ripe for adjudication and declined to reach the constitutionality of either Section 5a(11) of the CEA or CFTC Rule 7.201, *id.* at 932-935, both of which the CFTC interprets as mandating arbitration on customer demand. In dictum, this Court went on to say:

> the Board need not flout the rule in order to challenge its validity. A member or employee ordered by the Board or the Commission to arbitrate under Rule 7.201 could simply bring a suit to enjoin arbitration or to enjoin enforcement of an arbitration award against him on the ground that the Commission's rule requiring arbitration is invalid.

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[1] The defendants below were the CBOT, the CFTC and FSI Futures, Inc. The CBOT continues its dispute with the CFTC over this regulation by joining on appeal as the intervening-appellee, filing its own brief and participating with Geldermann on oral argument.

Id. at 933; this text was repeated in the footnote to CBOT Regulation 620.01(B), *infra* at 8. Geldermann is a CBOT member seeking to enjoin arbitration of claims filed against it by its former customer, FSI Futures, Inc. ("FSI"). Geldermann's complaint now requires us to consider the constitutionality of the Act, the CFTC Rule and the CBOT Regulation which mandate arbitration.

The CEA broadly prohibits fraudulent and manipulative conduct in connection with commodity futures transactions. In 1974, Congress "overhaul[ed] 'the Act in order to institute a more comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex.' " *Commodity Futures Trading Commission v. Schor*, 106 S. Ct. 3245, 3250 (quoting H.R. Rep. No. 93-975, 93rd Cong., 2d Sess. at 1 (1974)). To implement this new structure, Congress created the CFTC as an independent agency vested with sweeping authority to adopt any rules that in its judgment are necessary to effectuate the purposes of the Act. 7 U.S.C. § 12a(5) (1974). See generally *Schor*, 106 S. Ct. at 3250; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 365-366.

As part of the 1974 amendments to the Act, Congress passed Section 5a(11) which required a contract market such as the CBOT[2] to:

> Provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof: *Provided*, that (i) the use of such procedure by a customer shall be voluntary and (ii) the procedure shall not be applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term "customer" as used in this paragraph shall not include a futures commission merchant or floor broker. . . .

7 U.S.C. § 7a(11) (1974).

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[2] Pursuant to Section 5 of the Act, 7 U.S.C. § 7, the CBOT was designated by the Commission as a contract market.

To effectuate the provisions of Section 5a(11), in 1976 the Commission adopted regulations governing the administration of contract markets' customer grievances. The regulations required every contract market to "adopt rules which provide for a fair and equitable procedure through arbitration or otherwise for the settlement of customer's claims and grievances against any member" and set forth minimum requirements to be followed by a contract market when adopting such a procedure. 17 C.F.R. § 180.2 (1976). The Commission believed, as it still does, that its regulations require a contract market "to provide a procedure where the member must arbitrate when called upon to do so." 46 Fed. Reg. 57457, 57461 (Nov. 24, 1981). Further, it believed that Congress intended to compel arbitration upon customer request when it enacted Section 5a(11), 46 Fed. Reg. at 57458, and that a mandatory customer-initiated arbitration rule was necessary to effectuate the purposes underlying Section 5a(11). 46 Fed. Reg. 3027, 3028 (Jan. 13, 1981); accord *CBOT v. CFTC*, 704 F.2d at 934. As the Commission later stated when its interpretation was challenged by the CBOT, "[t]hese requirements would be meaningless and of no effect if exchanges did not require contract market members to participate in arbitration proceedings initiated by customers." 46 Fed. Reg. at 3028.

In accordance with the Commission's interpretation of Section 5a(11), ten of the eleven contract markets submitted arbitration rules which required their members to participate in arbitration proceedings initiated by customers; the Commission approved all of these rules. 46 Fed. Reg. at 3028 n.5. The one exception was the CBOT. The CBOT took the position that Section 5a(11), as implemented under 17 C.F.R. Part 180,[3] did not require members of the exchange to submit to the arbitration of claims when a customer initiates such a proceeding. *Id.* In direct opposition to the Commission, the CBOT pro-

[3] Part 180 of the CFTC's regulations covers arbitration or other dispute settlement procedures.

posed regulations that permitted members of that exchange or its employees to refuse to participate in arbitration proceedings initiated by customers. 46 Fed. Reg. at 3028

The Commission advised the CBOT that Congress did not intend to allow members the option of refusing to participate in exchange arbitration proceedings and requested that the CBOT amend its rules accordingly. *Id.* When the CBOT refused, the Commission, acting pursuant to its authority under Section 8a(7) of the Act, altered proposed CBOT Regulation 620.01(B) to conform to the Commission's interpretation of Section 5a(11) and adopted Rule 7.201 to reflect the alteration. 46 Fed. Reg. at 57463-57464.[4]

One month later, on December 24, 1981, the CBOT filed suit in the United States District Court for the Northern District of Illinois seeking both a permanent injunction to restrain the CFTC from enforcing Rule 7.201 and a declaratory judgment that the Rule, due to its preclusion of the right to a jury trial, violated the Seventh Amendment. *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, No. 81 C 7175, slip op. (N.D. Ill. April 23, 1982). The district court found that, contrary to the Commission's interpretation, Section 5a(11) did not require the CFTC to adopt rules mandating participation by contract market members in customer-initiated arbitration proceedings. *Id.* at 7. Because the district court deter-

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[4] Rule 7.201 stated in relevant part:

> *Customers' Claims and Grievances.* The Arbitration Committee and Mixed Panels constituted pursuant to Regulation 620.02 have jurisdiction to arbitrate all customers' claims and grievances not in excess of $15,000 against any member or employee thereof which have arisen prior to the date the customer's claim is asserted. If the customer elects to initiate an arbitration proceeding of any customer claim or grievance, *the member shall submit to arbitration* in accordance with these Arbitration Rules and Regulations.

17 C.F.R. § 7.201, Regulation 620.02(B) (1981) (emphasis added).

mined that the challenged arbitration requirement was imposed by the CFTC without direction by Congress to do so, it considered the constitutionality of CFTC Rule 7.201, but not of CEA Section 5a(11). The court held that Rule 7.201 violated the Seventh Amendment and permanently enjoined the CFTC from enforcing Rule 7.201 against the CBOT, its members and their employees. *Id.* The Commission appealed that decision to this Court, but before we decided the appeal, Congress amended Section 5a(11). See 704 F.2d at 934-935.

Congress' amendment repealed the language relating to compulsory payments, eliminated the $15,000 ceiling on claims subject to arbitration, and broadened the definition of customer.[5] Neither the effect of nor the intent behind these amendments was to reject the CFTC's interpretation of the Section. During the 1982 re-authorization process, Philip Johnson, the Chairman of the CFTC, expressly informed Congress of both the Commission's interpretation of Section 5a(11) and the 1982 conflicting opinion of the district court in *CBOT v. CFTC. Commodity Futures Trading Commission Reauthorization: Hearings before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 97th Cong., 2d Sess. 67 (1982) ("1982 Senate Hearings").[6] Thus aware of the conflicting interpretations

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[5] As amended in 1982, Section 5a(11) read: contract markets shall

> Provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: *Provided,* That (i) the use of such procedure by a customer shall be voluntary and (ii) the term "customer" as used in this subsection shall not include another member of the contract market. . . .

7 U.S.C. § 7a(11) (1983).

[6] The Chairman stated that "the Commission has interpreted the contract market arbitration provisions of 5a(11) of the Act to require a member or employee of an exchange against whom a cus-

(Footnote continued on following page)

of the Commission and the district court, Congress expressly stated that the 1982 amendments "[do] not affect the existing requirement that the use of arbitration by the customer is voluntary or the *Commission's understanding that exchange members must participate in arbitration proceedings which the customer has elected to pursue.*" H.R. Rep. No. 565, 97th Cong., 2d Sess. 56 (1982) (emphasis added).

During this interim period, the CBOT's appeal in *CBOT v. CFTC* reached this Court. We did not reach the substantive issues involved, but reversed the lower court on ripeness grounds. *CBOT v. CFTC*, 704 F.2d at 932-933; see also *supra*, at 2. As a result, the CBOT was compelled to distribute Regulation 620.01(B), as altered by Commission Rule 7.201, to its members. The CBOT, however, added the following footnote in its rulebook:

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[6] *continued*
tomer has a claim to arbitrate that claim if the customer wishes to do so." 1982 Senate Hearings at 67. The Chairman further informed Congress that:

> [r]elying upon its interpretation of Section 5a(11) the Commission recently disapproved the rules of one contract market and required the [CBOT] exchange to adopt a rule that a member or employee of the contract market must arbitrate at the behest of the customer. You should be aware, however, that the exchange has taken the position that the Commission's interpretation unconstitutionally deprives the member or employee of his right to jury trial protected by the Seventh Amendment to the Constitution and has challenged the Commission's action affecting its rules. *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, No. 81-C-7175 (McMillen, J.). Although the Commission argued that its interpretation was consistent with the language and purposes of Section 5a(11), the court agreed with the exchange and entered an order declaring the Commission's interpretation regarding the mandatory arbitration requirement to have violated the Seventh Amendment right to jury trial of members of the exchange.

Id.

> The following is the text of Regulation 620.01(B) as amended by CFTC Rule 7.201. The legality of Rule 7.201, and thus the obligation of Board of Trade members to arbitrate customer's claims and grievances, has been the subject of litigation between the Board of Trade and the CFTC. In 1982, the United States District Court for the Northern District of Illinois declared the Rule invalid, holding that CFTC Rule 7.201 is an unconstitutional denial of the right to a jury trial. However, on April 5, 1983, the Seventh Circuit Court of Appeals held that the case was not yet "ripe" for adjudication. While the Court did not rule on the merits, the Court went on to say: "Moreover, the Board need not flout the rule in order to challenge its validity. A member or employee ordered by the Board or the Commission to arbitrate under Rule 7.201 could simply bring a suit to enjoin arbitration or to enjoin enforcement of an arbitration award against him on the ground that the Commission's rule requiring arbitration is invalid."

Rules and Regulations, Board of Trade of the City of Chicago ("*CBOT Rules and Regulations*"), Regulation 620.01.

The CBOT took our dictum in *CBOT v. CFTC* literally and in the above-quoted footnote presented it verbatim as advice to members on how to challenge the rule. This case involves such a challenge. Geldermann, the plaintiff and a member of the CBOT, refused to arbitrate a customer-initiated claim by FSI under Regulation 620.01(B). The CBOT, despite its objections to the Regulation, is required by the CEA to enforce its rules. 7 U.S.C. § 7(a)(8). Failure to enforce its rules would subject the CBOT to a civil penalty and fines up to $100,000 and would subject CBOT officials to criminal prosecution and, upon conviction, fines and/or imprisonment. 7 U.S.C. § 13(a). Thus the CBOT attempted to force Geldermann to proceed with arbitration. Geldermann's continued refusal to submit to arbitration violated a regulation of the CBOT, the CEA and the CFTC rule. Each such violation subjected Geldermann to disciplinary proceedings. *CBOT Rules and Reg-*

ulations, Regulations 500.00 and 505.00. Geldermann was also subject to potential penalties which include fines, suspension and expulsion from the Exchange. *CBOT Rules and Regulations*, Regulation 560.00.

To forestall these severe consequences, Geldermann filed suit against the CBOT, CFTC and FSI in federal court seeking to enjoin the CBOT from requiring Geldermann to arbitrate its customer's claim. Geldermann challenged Section 5a(11) of the Act, Commission Rule 7.201 and CBOT Regulation 620.01(B) as violative of its constitutional rights under the Seventh Amendment and Article III.

Rejecting the Commission's interpretation of Section 5a(11), the district court concluded that Section 5a(11) of the CEA did not, in and of itself, require Geldermann to arbitrate its customers' claims; therefore, because the district court did not view the mandatory arbitration as congressionally imposed, the court did not consider the constitutionality of Section 5a(11). *Geldermann v. Board of Trade of the City of Chicago*, No. 85 C 07350, slip op. at 7 (N.D. Ill. Dec. 30, 1986). Instead, the district court considered the constitutionality of Rule 7.201 and Regulation 620.01(B) and held that each violated Geldermann's Seventh Amendment right to a jury trial. In dictum, the court indicated that the Rule and Regulation also appeared to violate Article III. *Id.* at 13. We disagree with this approach as well as the district court's ultimate holding regarding the constitutionality of CFTC Rule 7.201 and CBOT Regulation 620.01(B).

First, the district court erred by failing to accept the well established canon "that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844; see also *Schor*, 106 S. Ct. at 3254; *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 380-381; *Blinzinger v. Lyng*, No. 86-2674, 86-2698, slip op. at 6 (7th Cir. Nov. 4, 1987). This principle directs courts to

give considerable weight to the CFTC's contemporaneous and consistently held position that Section 5a(11), in accord with its terminology, requires commodity exchange members to submit to customer-initiated arbitration. Instead, with no apparent deference to the statutory language or the CFTC's interpretation of the statutory scheme that it is entrusted to administer and without analysis of the legislative history of the Act, the district court simply concluded that Section 5a(11) "does not . . . require the CFTC to pass a mandatory arbitration regulation. The CFTC could have passed a regulation providing that arbitration could proceed only if both broker and customer agreed." *Geldermann*, No. 85 C 07350, slip op. at 7. This conclusory dismissal of the Commission's interpretation fails to adhere to the standard of deference enunciated by the Supreme Court in *Chevron*, 467 U.S. at 844.

Second, in addition to the language of Section 5a(11), an examination of the legislative history of the Act shows that deference to the CFTC's interpretation is especially warranted because Congress has twice amended the CEA since the CFTC declared by regulation its interpretation of Section 5a(11)[7] and has not overturned the CFTC's position. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Schor*, 106 S. Ct. at 3255 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275).

Finally, to sustain the CFTC's interpretation there is no need to rely simply on canons of statutory construction or find tacit approval of the CFTC's position in congressional silence. When Congress amended the Act in 1978, it explicitly stated that it was not affecting "the

[7] Congress again amended the CEA in the Futures Trading Act of 1986 (100 Stat. 3556) without altering the CFTC's construction.

Commission's understanding that exchange members must participate in arbitration proceedings which the customer has elected to pursue." See *supra* at 6-7. At the time Congress made this statement in support of the Commission's interpretation, it was of course cognizant of the contrary interpretation asserted by the CBOT and adopted by the district court in *CBOT v. CFTC*. See *supra* at 6-7 n. 6.

In view of the abundant evidence that Congress intended to require exchange members to submit to customer-initiated arbitration proceedings, it is next necessary to address the question whether Section 5a(11) violates Article III.

II. *Article III of the Constitution Is Not Transgressed by Arbitration Here*

Article III, § 1 of the Constitution directs that "[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish . . ." and provides that these federal courts shall be staffed by judges who hold their offices during good behavior and whose compensation shall not be diminished during their tenure in office. Geldermann and the CBOT contend that Section 5a(11) of the CEA, CFTC Rule 7.201 and CBOT Regulation 620.01(B) all violate Article III insofar as they force Geldermann to submit to the resolution of customer claims against it by arbitrators who are not afforded the tenure and salary protections of Article III.

A. *Waiver of Article III's Personal Guarantees*

"Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate procedures by which civil and criminal matters must be tried." *Schor*, 106 S. Ct. at 3256. Therefore, the first question to consider is whether Geldermann waived its right to an Article III adjudication by consenting to submit to arbitration.

The district court found that Geldermann did not "knowingly, intentionally and voluntarily" waive its constitutional rights to an Article III forum and a jury trial. *Geldermann*, No. 85 C 07350, slip op. at 10, 13. However, both the facts of this case and the applicable law demonstrate that Geldermann did indeed consent to arbitration; therefore Geldermann cannot now complain that it is deprived of any claimed constitutional rights it might have had.

The district court rejected the evidence that Geldermann consented to arbitration because the court characterized the membership agreement between Geldermann and the CBOT as a contract of adhesion. It stated: "[w]here the parties to this contract the (CBT and Geldermann) are of such grossly unequal bargaining power, this court cannot consider Geldermann's agreement to the contract to be a 'voluntary' waiver of its constitutional rights." *Geldermann*, slip op. at 11. The court's finding that the parties were of "such grossly unequal bargaining power" is incredible in light of Geldermann's statement in its supporting affidavit that, measured by the customer balances it carries, Geldermann is reputed to be the largest commodity broker in the United States.

The district court also rejected the evidence of Geldermann's consent to arbitration because "[i]f it [Geldermann] was to continue in business, Geldermann had no choice but to accept the CBT's rules and regulations." *Id.* On this point, the court ignored the clear mandate of *Thomas v. Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325, regarding what constitutes consent to arbitration procedures.

Thomas concerned the data-sharing provision of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 135 *et seq.* As a precondition to registration of a pesticide under FIFRA, manufacturers must submit research data to the Environmental Protection Agency ("EPA") concerning the product's health, safety and environmental effects. The 1972 Act established data-sharing provisions to streamline pesticide registration procedures,

to increase competition, and to avoid unnecessary duplication of data generation costs. These data-sharing provisions both authorized the Administrator of the EPA to use data submitted by prior registrants to support the registration of "me-too" or "follow-on" registrants and established a scheme for sharing the costs of data generation. *Thomas*, 105 S. Ct. at 3328. Congress viewed this data sharing as essential to the registration scheme, *id.* at 3329 (citing S. Rep. No. 95-334 at 7 (1977)), but the then current system, which required the EPA to determine the proper compensation when the data-generating and follow-on registrants could not agree on an amount, proved unworkable.

In response, Congress amended FIFRA in 1978. For those conflicts in which the data-generating and follow-on registrants could not agree on an amount of compensation, Congress replaced the system of EPA determination with mandatory arbitration.[8] Under the new system,

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[8] Under amended Section 3(c)(1)(D)(ii):

> . . . the Administrator may, without the permission of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the "applicant") . . . only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator. . . . The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such an agreement, binding arbitration under this subparagraph. . . . If the Administrator determines that an original data submitter has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the original data submitter shall forfeit the right to compensation for the use of the data in support of the application. . . . *[I]f the Administrator determines that an applicant has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with*

(Footnote continued on following page)

any follow-on registrant who fails: (1) to agree on compensation with the data-generating registrant, (2) to participate in arbitration or, (3) refuses to comply with the terms of the agreement or arbitration decision, has its application denied or its registration canceled without further hearing. 7 U.S.C. § 136(a)(c)(1)(D)(ii).

If the EPA Administrator determines that an applicant has failed to participate in arbitration, the Administrator will deny the application or cancel the registration of the pesticide in support of which the data was used. If the follow-on registrant wants to enter or continue in business, it has no choice but to accept the EPA's rules and regulations, including the arbitration compensation scheme. Thus under FIFRA, an applicant has the option of participating in the arbitration scheme or going out of business. Yet despite this economic compulsion, the Supreme Court held that "the follow-on registrant . . . explicitly consents to have his rights determined by arbitration." *Thomas*, 105 S. Ct. at 3339. The Court found this explicit consent in the follow-on registrant's submission to the requirements of FIFRA Sections 3(c)(1)(D) and 3(c)(2)(D). *Id.* See 40 C.F.R. § 162.9-5(b) (1984).

In light of *Thomas*, the district court's finding that if Geldermann was to continue in business it had no choice but to accept the CBOT's rules and regulations has no impact on the question of Geldermann's consent to follow all of the rules of the CBOT, including the arbitration rules. Thus none of the district court's objections counter our holding that Geldermann consented to participate in customer-initiated arbitration proceedings.

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[8] *continued*
the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the Administrator shall deny the application or cancel the registration of the pesticide in support of which the data were used without further hearing.

7 U.S.C. § 136(a)(c)(1)(D)(ii) (emphasis added).

The district court's objections aside, the facts of this case as well as the applicable law clearly establish that Geldermann did indeed consent to arbitration. Geldermann is a member of the CBOT, a body this Court has previously determined to be a "voluntary association." See *Rosee v. Board of Trade of the City of Chicago*, 311 F.2d 524, 525 (7th Cir. 1963). As a precondition of membership, Geldermann signed "a written agreement to observe and be bound by the Charter, Rules and Regulations of the Association, and all amendments subsequently made thereto." *CBOT Rules and Regulations*, Regulation 205.00.

Subsequent to Geldermann's signing of the agreement and its admission as a CBOT member, the CBOT amended its rules to include Regulation 620.01(B). By virtue of its prior agreement, Geldermann consented to observe and be bound by the terms of Regulation 620.01(B), which unambiguously require Geldermann to arbitrate customer-initiated claims. In addition, Regulation 601.00 expressly provides:

> Arbitration of Customers' Claims and Grievances—The Board shall by regulation establish procedures in conformity with Section 5a(11) of the Commodity Exchange Act and Regulations thereunder for the settlement through arbitration of customers' claims and grievances against members and their employees. Every member, *by becoming such*, agrees to abide by all regulations prescribed by the Board pursuant to this rule, and further agrees to abide by and perform any award made thereunder.

CBOT Rules and Regulations, Regulation 601.00 (emphasis added).

Yet Geldermann asserts that it never consented to be bound by this rule—that CBOT membership alone is not sufficient to constitute consent to arbitration and therefore cannot establish a waiver of its constitutional right to an Article III forum. A review of the relevant case law, however, indicates that similar arguments by members of the National Association of Securities Dealers ("NASD") and

the New York Stock Exchange ("NYSE") have been uniformly rejected.

In *Patten Securities Corp., Inc. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987), plaintiff Patten was a member of the NASD, and as such had agreed to " 'abide by, comply with, and adhere to the . . . By-laws, the rules and regulations of the [NASD] as they are or may from time to time be adopted, changed or amended. . . .' " *Id.* at 405 (quoting *NASD By-laws*, Art. III, Sec. 1(a)(1)). The NASD adopted a code of arbitration procedure which provided that any dispute " 'shall be arbitrated under this Code, as provided for by any duly executed and enforceable written agreement or upon the demand of a customer.' " *Id.* at 406 (quoting *NASD Code of Arbitration Procedure*, Part III, Sec. 12(a), P3712, *reprinted in NASD Manual* (CCH) 3613-3).

One of Patten's customers filed a statement of claim against Patten with the NASD Director of Arbitration. The NASD accepted the claim and, according to its procedure, initiated arbitration proceedings. In response, Patten filed a complaint in the district court and moved for an order compelling the customer to discontinue the NASD arbitration. The district court denied the order. The Third Circuit affirmed, holding that: "It is therefore clear that . . . [the customer] can demand NASD arbitration of its disputes with Patten by virtue of 412(a), and *Patten is compelled by its NASD membership* to submit even absent a specific contractual arbitration undertaking directly with [the customer]." *Id.* at 406 (emphasis added). Thus Patten was compelled by virtue of its NASD membership to arbitrate its customer's claim.

In a parallel case, the defendants in *Paine, Webber, Jackson & Curtis v. Chase Manhattan*, 728 F.2d 577 (2d Cir. 1984), non-members of the NYSE, sought to compel plaintiff Paine Webber, a member of the NYSE, to submit its claim against the defendants to NYSE arbitration. The defendants did not claim that they had an agreement with Paine Webber requiring the submission of disputes between

them to arbitration. Rather they relied exclusively on the Constitution and Rules of the NYSE which require NYSE members to submit to arbitration any controversies with non-members arising out of the member's business. *Id.* at 579.

The district court found that the parties had not indicated any intention to be bound by the NYSE arbitration provisions and, in the absence of such an agreement between the parties requiring arbitration, Paine Webber could not be compelled to arbitrate its claims. *Id.* at 580. On appeal, the Second Circuit rejected this analysis. Contrary to the district court, the reviewing court held that membership in the NYSE, with its concomittant obligation to be governed by the Constitution and Rules of the NYSE, was sufficient to constitute consent to arbitration. The court stated: "we believe that *the arbitration provisions of the NYSE Constitution and Rules are sufficient in and of themselves to compel arbitration* of covered disputes under § 3, whether or not they are incorporated in a purchase and sale agreement." *Id.* The Second Circuit nevertheless upheld the result that arbitration could not be compelled in that case because the dispute at issue was not a covered dispute. The court's holding that the arbitration provisions of the NYSE Constitution and Rules are sufficient in and of themselves to compel arbitration of covered disputes was consistent with past decisions of that court. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1288-1289 (2d Cir. 1984) (despite inapplicability of specific NYSE employee arbitration rule, provision of NYSE Constitution allowing non-members to compel arbitration of any controversy "arising out of the business" of a member was sufficient to compel member to arbitrate employee's claims); *Coenen v. R.W. Pressprich*, 453 F.2d 1209, 1211-1212 (2d Cir. 1972) (member signed a pledge to abide by the entire Constitution which contained an arbitration provision; the court held that "one desiring the benefits of membership in the New York Stock Exchange must be willing to live up to the responsibilities of such membership" and therefore

ordered the member to arbitrate); *Axelrod & Co. v. Kordich, Victor & Neufeld*, 451 F.2d 838, 840-841 (2d Cir. 1971) (by virtue of member's agreement to be governed by the NYSE's Constitution, non-member broker-dealer firm may invoke the compulsory arbitration rules of the NYSE over the opposition of a member firm). Consistent with the parallel rulings of the Second and Third Circuits we hold that by virtue of its continued membership in the CBOT, Geldermann consented to the resolution of claims against it in customer-initiated arbitration proceedings.[9]

Yet Geldermann questions its "voluntary" consent to a rule which was added to the CBOT's rule book over the exchange's protest. It is indisputable that the CBOT has strenuously and repeatedly objected to mandatory arbitration. The CBOT adopted Regulation 620.01(B) under

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[9] We recognize that our holding may seem to present a catch-22 situation in which a CBOT member's claim against arbitration will always be either not ripe for adjudication or waived. For example, our dictum in *CBOT v. CFTC* suggested that the CBOT's jurisdictional problem satisfying the ripeness requirement might be solved in a suit brought by a member to enjoin arbitration. *CBOT v. CFTC*, 704 F.2d at 933. Yet now, when a member brings such a suit, we hold that its status as a member solves the procedural problem but waives its substantive claim. But this is not really a catch-22 situation because Geldermann could have satisfied the ripeness requirement and preserved its constitutional claim by resigning its membership in the CBOT. When viewed in the context of the highly regulated commodities industry, this is not such an extreme step to demand in order to retain a constitutional right. Geldermann receives substantial benefits from the highly regulated nature of the industry. Kevin Mack, the president of Geldermann, stated in his affidavit, "the market activities of member firms under the Act are subject to the constant scrutiny of the exchange's surveillance and disciplinary system, a circumstance reassuring to significant commercial entities." It is reasonable to infer that the significant commercial entities that are Geldermann's customers also find it reassuring that they can, under the rules of the exchange, compel Geldermann to arbitrate claims they have against it. Geldermann cannot continue to have the benefits of membership while refusing to accept its concomitant responsibilities.

compulsion and the CBOT amended the Regulation to include a disclosure of its questionable legality and a description of the procedure by which a member might challenge the Regulation, see *supra* at 8. But Geldermann itself has not consistently objected to customer-initiated arbitration proceedings under the Regulation. In fact a review of the factual background that produced the particular arbitration dispute underlying this case highlights the manner in which Geldermann's objection in this case resembles the belated, self-serving objection of the plaintiff in *Schor*.

Defendant FSI is not a party in this appeal, but was the party that brought the underlying arbitration demand. FSI is a futures commission merchant, but is not a member of the CBOT and thus cannot clear its customers' trades itself. Until May 1985, FSI maintained an omnibus account with Geldermann and conducted its customer trading on the CBOT through that account. In April 1985, pursuant to Rule 7.201 and Regulation 620.01(B), FSI initiated an arbitration proceeding against Geldermann for Geldermann's alleged failure to fill an FSI purchase order properly. Geldermann submitted to FSI's demand for arbitration of this claim without raising any objection regarding the constitutionality of the Rule and Regulation or claiming that it had not consented to be bound by the Rule and Regulation. The parties arbitrated the claim and Geldermann lost. The arbitrator awarded FSI $54,718.

Shortly after the arbitration, Geldermann notified FSI that it was terminating FSI's account and requested that FSI make immediate arrangements to transfer all of its open positions to another CBOT member firm. FSI arranged to transfer its open positions and, in effectuating the transfer, Geldermann charged FSI the full round-turn commission for each open position transferred. In May 1985, FSI again initiated an arbitration proceeding against Geldermann for money damages for three claims, including a claim for interest due FSI as a result of Geldermann's late payment of the first arbitration award. This time Geldermann objected by filing this suit. See *supra* at 9.

Under a separate provision of the CEA, the plaintiff in *Schor* acted similarly. The CEA, in addition to providing for arbitration as an alternative to federal litigation, also provides a CFTC reparations proceeding to handle customer complaints. In that case plaintiff Schor invoked the CFTC's reparations jurisdiction by filing complaints against the defendant Conti with the CFTC. Before receiving notice that Schor had commenced the reparations proceeding, Conti filed a diversity action in federal district court to recover a debit balance in Schor's account. Schor counterclaimed in the district court action but moved on two separate occasions to dismiss or stay the district court action, arguing that the CFTC reparations proceeding would fully resolve and adjudicate all the rights of the parties with respect to the transactions which were the subject matter of the district court action. Although the district court declined to stay or dismiss the suit, Conti voluntarily dismissed the federal court action and presented its debit balance claim by way of a counterclaim in the CFTC reparation proceeding initiated by Schor. In the reparations proceeding, the Administrative Law Judge ("ALJ") ruled against Schor on both his claim and on Conti's counterclaim. Only after losing did Schor, for the first time, challenge the CFTC's statutory authority to adjudicate Conti's counterclaim. *Schor*, 106 S. Ct. at 3250-3251.

The Supreme Court held that Schor waived his right to an Article III forum because he demanded that Conti proceed on its counterclaim before the CFTC rather than in district court and "was content to have the entire dispute settled in the forum he selected until the ALJ ruled against him on all counts; it was only after the ALJ rendered a decision to which he objected that Schor raised any challenge. . . . " *Id.* at 3257. By initiating the reparations proceeding and expressly demanding that Conti proceed on its counterclaim in the reparations proceeding rather than before the district court, "Schor indisputably waived any right he many have possessed to the full trial of Conti's counterclaim before an Article III court." *Id.*

While Geldermann's consent to arbitration may not be as "indisputable" as Schor's consent to the adjudication of Conti's state law counterclaims in the CFTC reparations proceeding because Geldermann did not initiate and insist upon arbitration of this claim, comparison of the circumstances in which Geldermann and Schor first objected to the non-Article III adjudication of their claims supports our conclusion that Geldermann consented to customer-initiated arbitration under Regulation 620.01(B). Both Schor and Geldermann were content to have their disputes settled by a non-Article III forum until they lost. Both challenged the constitutionality of the Act only after an arbitration or reparations panel ruled against them. We conclude that both consented to adjudication by a non-Article III forum.[10]

B. *Non-waivable Article III Interests*

Our holding that Geldermann consented to arbitration, and thus waived any right he may have possessed to a full trial before an Article III court, is not completely dipositive of the issue. "Article III, § 1 not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as 'an inseparable element of the constitutional system of checks and balances.' " *Schor*, 106 S. Ct. at 3257 (quoting *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58, 102 S. Ct. 2858, 2864). To the extent that this structural principle is implicated, notions of consent and

[10] *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, is not to the contrary. In that case the litigants did not consent to a non-Article III adjudication of their claims. As stated in *Thomas*, *Northern Pipeline* does not hold that the right to an Article III forum is absolute unless the federal government is a party. *Thomas*, 105 S. Ct. at 3336. Also, the scope of jurisdiction of exchange arbitrators is limited to customer-broker claims arising out of exchange transactions in contrast to the bankruptcy court's broad jurisdiction in *Northern Pipeline*.

waiver are not controlling because the guarantees of Article III serve institutional interests that the parties cannot be expected to protect. *Schor*, 106 S. Ct. at 3257-3258.

However, the Supreme Court deliberately has not provided rules to determine when a given congressional decision to authorize the adjudication of Article III matters in a non-Article III forum implicates the structural principle of institutional integrity and overrides the consent of the parties. The Court has stated that "[a]lthough such [formalistic and unbending] rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." *Id.* at 3258. In avoiding unbending strictures the Court has "also been faithful to [its] precedents, which counsel that bright line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries." *Id.* at 3261. Accordingly, "in this area of 'frequently arcane distinctions and confusing precedents,' " *Thomas*, 105 S. Ct. at 3334 (quoting *Northern Pipeline*, 102 S. Ct. at 2881), we are left without a clear picture of when a particular congressional plan implicates this structural principle of institutional integrity.

Despite the express refusal of the Court in *Schor* to formulate bright line rules to follow in this area generally, the similarities between the congressional plans attacked by Schor and Geldermann make the analysis in *Schor* the most pertinent guide for us in this case. The plaintiffs in both *Schor* and this case challenged the CEA, particularly Congress' power to allow the adjudication of state common law claims in a non-Article III forum[11]

[11] Although the claims in both cases were state law claims, actual or potential diversity jurisdiction existed. The plaintiff on the counterclaim in *Schor* had originally brought the claim in federal court on the basis of diversity jurisdiction. *Schor*, 106 S. Ct. at 3258. It also appears diversity exists between Geldermann, an Illi-

(Footnote continued on following page)

under CEA Sections 14 and 5a(11). Both the reparations procedure at issue in *Schor* and the arbitration procedure at issue here were created by Congress to provide inexpensive and expeditious alternative forums in which customers could settle their claims against professional brokers. In each instance Congress gave the CFTC or arbitrators the authority to adjudicate such matters but left entirely to the complaining parties the decision to invoke either forum. See *Schor*, 106 S. Ct. at 3260. In support of these delegations, the Court in *Schor* stated that, "[i]n such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing participants may, at their option, elect to resolve their differences." *Id.* From the above-quoted language it appears that the Supreme Court would view the congressional scheme of allowing commodity customers the option of electing arbitration as intruding on the province of the judiciary even less than the reparations procedure in *Schor*. To justify the reparations procedure challenged in *Schor*, the Court analogized it to a situation in which the legislature encouraged parties to arbitrate; a situation for which the Court believed it was self-evident that no impermissible incursion on the separation of powers was involved. Under Section 5(a)(11), Congress provides commodity customers the option of electing arbitration. Provision of this option does not violate the separation of powers.

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[11] *continued*

nois corporation, and FSI, a New York corporation. However, we note that if, in the absence of an available arbitration procedure, FSI chose to file in Illinois state court rather than in federal court, as a resident defendant, Geldermann could not remove the suit to federal court, 28 U.S.C. § 1441(b), and without any violation of the Constitution would be foreclosed from an Article III forum.

The fact that the non-Article III forum challenged is arbitration is also of importance. Recently in a case arising in the related securities industry, the Supreme Court reaffirmed that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, establishes a " 'federal policy favoring arbitration.' " *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2337 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941). The Court of Appeals for the District of Columbia found that:

> [t]he rationale for this policy is at its strongest where the arbitration will be governed by procedures specifically tailored to the context from which the agreement to arbitrate arises, and will be conducted by arbitrators who are expert in the norms and practices of the relevant industry. Labor arbitration is one such context. The arbitration system of the New York Stock Exchange is another.

Pearce v. E.F. Hutton Group, Inc., No. 86-5281 (D.C. Cir. Sept. 11, 1987). We agree and add a third system to the securities and labor list—the arbitration system of the Board of Trade of the City of Chicago. Providing arbitration as an option for customers with complaints against members of the CBOT is consistent with the strong federal policy favoring that method of disposition.

We recognize that although the federal scheme of providing commodity customers the option of demanding arbitration of their claims is consistent with the federal policy favoring arbitration, in this case it is state law that authorizes and defines arbitration and state courts that enforce arbitration awards. See, *e.g.*, Ill. Rev. Stat. ch. 10, § 101 *et seq.* (1985) (the Uniform Arbitration Act). The arbitration rules and regulations adopted by the CBOT in response to Section 5a(11) acknowledge state control in this area and specifically incorporate and comply with the Uniform Arbitration Act of Illinois, *CBOT Rules and Regulations*, Regulations 601.00, 603.06 and 640.05. Therefore, through the operation of Section 5a(11) and the CBOT regulations, Congress is here requiring the Illinois state

arbitration system and Illinois state courts to assist in the administration of a federal scheme.

Although having the states actively participate in implementing a federal program appears unique, a similar scheme was upheld in *FERC v. Mississippi*, 456 U.S. 742. There the statute challenged by the state of Mississippi required the use of state regulatory machinery to advance federal energy goals. The Supreme Court upheld the requirement that the Mississippi Public Service Commission adjudicate disputes arising under the federal statute because "the policy of the federal Act is the prevailing policy in every state" and should be respected accordingly. *Id.* at 760 (quoting *Testa v. Katt*, 330 U.S. 386, 393). Consistent with this Supreme Court precedent, Congress and the CBOT can require the Illinois arbitration apparatus and Illinois state courts to administer customer-initiated arbitration allowed under the CEA.

Finally, a holding that Section 5a(11) implicates the structural principle of institutional integrity and thus violates Article III would not prevent customers, despite the objection of CBOT members, from removing commodity cases from the reach of an Article III forum. All such cases, including state law counterclaims, could still be heard by the CFTC in reparations proceedings without violating the Constitution. See *Schor*, 106 S. Ct. at 3260.

For the reasons set forth above, we hold that neither Section 5a(11) nor CFTC Rule 7.201 nor CBOT Regulation 620.01 threatens the structural integrity of the courts or the separation of power between the branches of the federal government. Therefore Geldermann's waiver of its personal right to an Article III forum is binding. Compelling Geldermann to arbitrate FSI's claims against it does not violate Article III.

III. *Arbitration Here Does Not Implicate the Seventh Amendment.*

Geldermann also contends that the mandatory customer-initiated arbitration plan violates its right to a jury trial under the Seventh Amendment. Because the district court

held that Section 5a(11) does not require the CFTC to promulgate mandatory arbitration rules, it did not evaluate the constitutionality of the CEA, but only whether CFTC Rule 7.201 and CBOT Regulation 620.01(B) violate the Seventh Amendment. *Geldermann*, No. 85 C 07350, slip op. at 7. It held that both violate Geldermann's rights under the Seventh Amendment. We reverse.

In addressing Geldermann's two contentions, that the mandatory arbitration violated his rights under Article III and the Seventh Amendment, the district court appears to have considered the two challenges as independent and alternative grounds for relief. It first addressed Geldermann's Seventh Amendment challenge; then, having ruled that the arbitration plan violated that Amendment, the court concluded that it "need not address Geldermann's Article III claim." *Id.* at 13. The district court resolved the problem backwards. The court should have first addressed the issue of whether Geldermann had the right to an Article III forum; then if it ruled that no such right existed, it need not have addressed Geldermann's Seventh Amendment claim. In a non-Article III forum the Seventh Amendment simply does not apply. See, *e.g.*, *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 449-461 (action for civil penalties before Occupational Safety and Health Review Commission not jury triable of right); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (Seventh Amendment does not apply to suit for backpay before National Labor Relations Board); see also Note, *Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions*, 95 Yale L.J. 1459, 1459-1460 (1986). Because we hold that Geldermann is not entitled to an Article III forum, the Seventh Amendment is not implicated.

REVERSED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GELDERMANN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 85 C 07350
	)	
BOARD OF TRADE OF THE CITY OF CHICAGO, a specially chartered Illinois corporation; COMMODITY FUTURES TRADING COMMISSION, a United States Government agency; and FSI FUTURES, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Geldermann, Inc. brought this action for an order enjoining the Chicago Board of Trade ("CBT") from requiring Geldermann to arbitrate a customer claim. Geldermann named as defendants the CBT, the Commodity Futures Trading Commission ("CFTC") and FSI Futures, Inc. ("FSI"), a former customer of Geldermann. Geldermann claims that the mandatory arbitration scheme in CFTC Regulation 7.201 and in CBT Rule 620.01(B) violates Geldermann's constitutional rights.

In October 1985 Geldermann and the CFTC filed cross-motions for summary judgment. On March 28, 1986 this court denied both motions, finding that Geldermann's pos-

sible consent to the CFTC mandatory arbitration scheme constituted a genuine issue of material fact. In April and June, 1986, after they had briefed the consent question, both parties renewed their motions for summary judgment. In July, 1986 the Supreme Court decided *Commodity Futures Trading Commission v. Schor,* 106 S.Ct. 3245 (1986). In July and August, 1986 the parties submitted briefs addressing *Schor's* impact on this litigation.

BACKGROUND FACTS

The parties do not dispute the material facts underlying this litigation. Geldermann, Inc. is a commodity brokerage firm. It is registered with the Commission as a futures commission merchant pursuant to § 4d(1) of the Commodity Exchange Act, 7 U.S.C. § 6d(1) (the "CEA"). Geldermann is a member firm of the Chicago Board of Trade.

The Commodity Futures Trading Commission is an independent federal agency established pursuant to the CEA. The CFTC regulates commodity exchanges such as the CBT. The Commission is empowered under Section 8a(5) of the CEA, 7 U.S.C. § 12a(5) to make rules and regulations to effectuate the purposes of the CEA and under Section 8a(7) of the CEA, 7 U.S.C. § 12a(7) to alter the rules of a contract market.

The CBT is a specially chartered Illinois corporation. The CFTC regulates the CBT and has designated it as a contract market. As a contract market, the CBT is required to submit its rules to the Commission for approval and to:

> provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: Provided, that (i) the use of such procedure by a customer shall be voluntary and (ii) the

> term "customer" as used in this paragraph shall not include another member of the contract market . . ."

7 U.S.C. § 7(a)(11)[1].

FSI Futures, Inc. is a foreign corporation with its principal place of business in New York. It is licensed by the Commission as a commodity futures commission merchant. FSI is not a member of the CBT. Until May, 1985, it was a customer of Geldermann, having maintained an omnibus account with Geldermann through that date. FSI regularly conducted its customer trading on the CBT through that account.

FSI seeks arbitration under CFTC Regulation 7.201 and CBT Rule 620.01(B), which provide that a customer may compel a CBT member to submit to arbitration:

> *Customer's Claims and Grievances.* The Arbitration Committee and Mixed Panels constituted pursuant to Regulation 620.02 have jurisdiction to arbitrate all customer's claims and grievances against any member or employee thereof which have arisen prior to the date the customer's claim is asserted. If the customer elects to initiate an arbitration proceeding of any customer claim or grievance, the member shall submit to arbitration in accordance with these Arbitration Rules and Regulations.

The CFTC passed this mandatory arbitration rule in November, 1981 when, under its powers to alter exchange rules, it disapproved the CBT's proposed voluntary arbitration rule.

The CBT previously sought to void Commission Regulation 7.201 and CBT Rule 620.01(B) in *Board of Trade*

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[1] In 1982 Congress deleted several additional provisos to 7 U.S.C. § 7(a)(11). Congress deleted (1) the proviso that "the procedure shall not result in any compulsory payment except as agreed upon between the parties,"; (2) a $15,000 ceiling on the kind of claims which a customer can seek to arbitrate; and (3) a proviso which declared that a floor broker could not be a "customer."

of City of Chicago v. Commodity Futures Trading Commission, No. 81 C 7175 (N.D. Ill. April 23, 1982) (hereinafter *CBT v. CFTC*). In *CBT v. CFTC*, CBT claimed that (1) the Commission acted arbitrarily in promulgating Reg. 7.201 because the Commission wrongly believed that Section 5a(11) of the CEA required a compulsory arbitration and (2) the mandatory arbitration procedure deprives CBT members of their Seventh Amendment right to a jury trial. The CFTC defended the suit by claiming that the CBT lacked standing, that the lawsuit did not present "ripe" issues, and that the Seventh Amendment did not apply to claims subject to compulsory arbitration.

On April 23, 1983, the district court in *CBT v. CFTC* entered judgment for the CBT. The district court permanently enjoined the CFTC from enforcing Commission Rule 7.201. The district court held that the rule violated the Seventh Amendment by compelling CBT members to arbitrate common law legal claims. The district court also held that the CEA does not require the CFTC to adopt a mandatory arbitration rule.

On appeal, the Seventh Circuit reversed on grounds of ripeness. *CBT v. CFTC*, 704 F.2d 929 (7th Cir. 1983). The Seventh Circuit held that neither the CBT nor its members had suffered harm from the CFTC regulation and that the case lacked a "specific factual context." Furthermore, the Seventh Circuit wrote, the CFTC might "choose not to apply its rule" when presented with a particular customer demand for arbitration. The Seventh Circuit concluded that it could not decide, in the case before it, whether the CFTC regulation violated the Seventh Amendment.

When Geldermann became a CBT member, it agreed to abide by all regulations prescribed by the exchange. All CBT rules are listed in its rulebook. Since 1983 the CBT rule book has included the following footnote:

> The legality of Rule 7.201 and thus the obligation of Board of Trade members to arbitrate customers' claims and grievances, has been the subject of litiga-

> tion between the Board of Trade and the CFTC. In 1982, the United States District Court for the Northern District of Illinois declared the Rule invalid, holding that the CFTC Rule 7.201 is an unconstitutional denial of the right to a jury trial. However, on April 5, 1983, the Seventh Circuit Court of Appeals held that the case was not yet "ripe" for adjudication. While the Court did not rule on the merits, the Court went on to say: "Moreover, the Board need not flout the rule in order to challenge its validity. A member or employee ordered by the Board or the Commission to arbitrate under Rule 7.201 could simply bring a suit to enjoin arbitration or to enjoin enforcement of an arbitration award against him on the ground that the Commission's rule requiring arbitration is invalid."

In April, 1985 FSI asserted a claim against Geldermann based on Geldermann's failure to fill a purchase order. Geldermann and FSI arbitrated this claim. The arbitrator awarded FSI $54,718. Shortly after the arbitration, Geldermann notified FSI that it wished to terminate its relationship with FSI and requested that FSI make immediate arrangements to transfer all open positions to another clearing firm. FSI charged Geldermann "full round" commissions for this transfer service. FSI seeks to arbitrate the question whether, by charging these commissions, FSI breached an agreement with Geldermann.

On May 24, 1985, FSI filed a demand with the CBT for arbitration against Geldermann seeking money damages for three claims. The first claim was for the $22,165.22 in commissions which Geldermann charged FSI when Geldermann transferred to another brokerage firm all FSI positions and cash balances. FSI's second claim was for interest allegedly due FSI as a result of Geldermann's delay in forwarding FSI's cash balances. FSI's last claim was for interest allegedly due FSI as the result of Geldermann's late payment of the earlier arbitration award.

Geldermann objects to FSI's demand for compulsory arbitration. Geldermann asserts that FSI's claims are claims

at common law, so that (1) under the Seventh Amendment, Geldermann has a right to have them tried by a jury, and (2) under Article III of the United States Constitution, Geldermann has a right to have the claims tried in the district court. Geldermann requests (1) a declaration that, as applied to the FSI claims in issue, Commission Regulation § 7.201 and CBT Rule 620.01(B) abridge Geldermann's rights under the Seventh Amendment and Article III, and (2) an injunction against compulsory arbitration.

DISCUSSION

This court must initially define the scope of Geldermann's challenge. The CEA requires a contract market to:

> provide a fair and equitable procedure through arbitration or otherwise . . . for the settlement of customer's claims and grievances against any member or employee thereof: provided that the use of such procedure by a customer shall be voluntary . . .

7 U.S.C. § 7(a)(11).

This provision (in conjunction with 7 U.S.C. § 12(a)(5), which authorizes the CFTC to pass all regulations necessary to effectuate the purposes of the CEA) authorizes the CFTC to pass a regulation requiring brokers to arbitrate customers claims. § 5(a)(11) does not, however, require the CFTC to pass a mandatory arbitration regulation. The CFTC could have passed a regulation providing that arbitration would proceed only if both broker and customer so agreed. *See CBT v. CFTC*, No. 81 C 7175, slip op. (N.D. Ill. April 23, 1982). Because this court concludes that the CEA does not itself require Geldermann to arbitrate FSI's claim, this court need not evaluate the constitutionality of the CEA.

The Seventh Amendment provides that "(in) suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." U.S. Const. Amend. VII. Whether the Seventh

Amendment guarantees CBT members the right to have a customer claim tried before a jury depends upon the nature of the claim, the kinds of rights the client asserts and the type of relief the client requests. *CBT v. CFTC*, 704 F.2d 929, 932 (7th Cir. 1983).

If a client asserts legal rights which entitle him to a money judgment of the kind customarily granted by a court of law, *Dairy Queen v. Wood*, 369 U.S. 469, 477-8 (1962), the Seventh Amendment applies. The Seventh Amendment applies even to rights "unheard of at common law," *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974), so long as they are of the sort traditionally enforced in an action at law. *Id.*

FSI's claims against Geldermann are of a traditionally legal character. FSI asserts that Geldermann breached an agreement and deviated from trade practice in charging FSI "round turn" commissions. FSI also claims that Geldermann transferred open positions three days later than FSI instructed and that this delay caused FSI financial loss of $894.44.[2] Finally, FSI claims that, by failing to remit the April 8, 1985 arbitration award until May 9, 1985, Geldermann deviated from the parties' course of dealings. FSI's claims sound in contract, debt and conversion. Contract, debt and conversion claims have traditionally been triable to a jury.[3] *See Ross v. Berhard*, 396 U.S. 531, 542, 90 S.Ct. 735, 740 (1977).

While a party can waive his right to a jury trial, *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985) Geldermann has not done so. Seventh Amendment rights

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[2] FSI borrowed $1,400,000.00 to cover the cost of margin at the transferee clearing firm. The interest on this loan for two days is $894.44.

[3] State law creates and provides the rule of decision for the rights which FSI asserts; FSI's claims do not involve "public rights." *Cf. Thomas v. Union Carbide Agr. Products Co.*, ___ U.S. ___, 105 S.Ct. 3325 (1985); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 97 S.Ct. 1261 (1977).

may only be waived knowingly, intentionally and voluntarily. *Leasing Service Corp. v. Crane, et al.*, No. 85-1679, 85-1755 slip op. (4th Cir. October 30, 1986); *K.M.C. supra* at 755-6; *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977); *Rocco Ferrera & Co., Inc. v. G.H.A. Lockjoint, Inc.*, No. 85-7186, slip op. (N.D. Ill. October 11, 1985). Courts are to narrowly construe a waiver of Seventh Amendment rights and are to indulge in every reasonable presumption against waiver. *See also Beacon Theater, Inc. v. Westover*, 359 U.S. 512, 79 S.Ct. 948 (1959); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 812 (1937). This court cannot conclude that Geldermann knowingly, intentionally and voluntarily relinquished its right to a jury trial.

Upon becoming a CBT member, Geldermann signed a form contract, agreeing generally to abide by all CBT rules and regulations. Since 1983, the CBT included a disclaimer in its rulebook stating that a Northern District of Illinois court had invalidated Regulation 7.201 as a violation of the Seventh Amendment. The disclaimer also stated that, in 1983, the Seventh Circuit (1) had vacated the district court decision on ripeness grounds and (2) had suggested the proper procedure for challenging Regulation 7.201. Thus, while the disclaimer notified Geldermann of the mandatory arbitration scheme in Regulation 7.201 and CBT Rule 620.01(B), the disclaimer did not make clear that, if Geldermann accepted CBT membership, Geldermann would waive its Seventh Amendment rights. Rather, the disclaimer suggested that a court would again invalidate the regulation when a member challenged it in the proper procedure. Geldermann did not, in these circumstances, knowingly and intentionally waive its Seventh Amendment right.[4]

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[4] The Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 95, 92 S.Ct. 1983, 2002 (1972) wrote:

> . . . a waiver of constitutional rights in any context must, at the very *least*, be clear. We need not concern ourselves with

(Footnote continued on following page)

Neither did Geldermann "voluntarily" waive its Seventh Amendment right. In order to become an exchange member Geldermann had to agree to abide by all CBT rules and regulations. Exchange membership is an economic necessity for Geldermann's conduct of business. *See* Affidavit of Kevin Mack, President of Geldermann, Inc. Where the parties to this contract (the CBT and Geldermann) are of such grossly unequal bargaining power, this court cannot consider Geldermann's agreement to the contract to be a "voluntary" waiver of its constitutional rights. If it was to continue in business, Geldermann had no choice but to accept the CBT's rules and regulations. *See Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983 (1972) (defendant did not waive his due process rights when parties had not bargained over waiver clause, contract was an adhesion contract and parties had unequal bargaining power); *Serpas, Johnson & Waters v. Schmidt, et al.,* No. 85-2393 slip op. (7th Cir. December 19, 1986) (holding that the Illinois Racing Board may not issue licenses to backstretchers on the condition that licensees consent to a waiver of Fourth Amendment rights); *Geras v. Lafayette Display Fixtures, Inc.,* 742 F.2d 1037, 1042 (7th Cir. 1984) (upholding Federal Magistrate Act's scheme for waiver of constitutional rights but stressing that litigants must have "reasonable and viable choice"; plaintiff in this case had not shown "hard evidence of economic, or other systemic coercion"); *National Equipment Rental, Ltd. v. Hendrix,* 565 F.2d 255, 258 (2d Cir. 1977) (defendant did not waive his jury trial right, despite his signature on contract with express waiver clause; waiver clause was

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[4] *continued*

the involuntaries or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.

See also K.M.C. Co., Inc. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985) (the district court could not find that plaintiff waived its jury trial right, as defendant may have told plaintiff that waiver clause would not be enforced).

part of a form contract and defendant had no choice but to accept the contract "if he was to get badly needed funds"); *Rocco Ferrera & Co., Inc. v. G.H.A. Lockjoint, Inc., et al.*, No. 85-7186 slip op. (October 11, 1985) ("Waiver is not the norm, because the bargaining power of the parties is frequently unequal and the plaintiff may not be in a position to object to the contractual waiver."); *Evans v. City of Chicago*, 522 F.Supp. 789, 795 (N.D. Ill. 1980) ("since plaintiffs may show that paragraph 9 put them to the choice of either (1) not settling and thus incurring additional substantial delay or (2) waiving their rights . . . we can't conclude at this stage of the proceeding that the element of voluntariness necessary for a relinquishment of constitutional rights is present here.").

The Supreme Court's decision in *Thomas v. Union Carbide Agricultural Products Co.*, 105 S.Ct. 3325 (1985) and in *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986) do not require this court to conclude that Geldermann waived its Seventh Amendment rights. In *Thomas* the Supreme Court upheld, against an Article III challenge, the mandatory arbitration scheme in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The plaintiff in *Thomas* did not raise a Seventh Amendment issue. More importantly, the Supreme Court did not rest its decision on a finding that plaintiff had waived its Article III right by registering under FIFRA. The Court held instead that plaintiff did not *have* an Article III right to a federal court determination.

In *Schor* the Supreme Court upheld, against an Article III challenge, CFTC jurisdiction over permissive counterclaims in CEA reparations actions. 106 S.Ct. 3245 (1986). The Court held that a party could waive his Article III rights either expressly or by foregoing an available Article III forum. *Schor* does not allow this court to find that Geldermann waived its jury trial right. Geldermann did not forego a jury trial of FSI's claims; whether Geldermann can try FSI's claims before a jury (or in any non-arbitration forum) is the issue in this case.

Because this court concludes that Regulation 7.201 and CBT Rule 620.01(B) violate Geldermann's Seventh Amendment right, this court need not address Geldermann's Article III claim. It appears, however, that Geldermann's Article III claim is a strong one.

Article III creates both a waivable personal interest and a nonwaivable "structural" interest in preserving the separation between federal governmental powers. *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986). Article III bestows a personal right to a federal tribunal on a party who asserts private rights. In the present case, Geldermann wishes to defend itself against FSI's private, state law created claims. As discussed earlier, Geldermann has not knowingly, intentionally and voluntarily waived its personal Article III right.

In addition, Regulation 7.201 and CBT Rule 620.01(B) implicate the structural protections of Article III. Courts balance several factors in determining whether legislation impermissibly threatens the institutional integrity of the federal judiciary: the extent to which Article III courts retain the essential attributes of judicial power, the extent to which non-Article III forums exercise powers vested only in Article III courts, the origins and importance of the rights asserted and the concerns that drove Congress to depart from Article III requirements. *Schor, supra* at 3258. Although separation of powers concerns diminish when a party willingly elects to forego an Article III forum, Geldermann has not done so. When consent to Regulation 7.201 is not truly knowing and voluntary, the regulation erodes the structural protections of Article III.

CONCLUSION

For the foregoing reasons, this court holds that Regulation 7.201 and CBT Rule 620.01(B), as applied to Geldermann in this case, violate the Seventh Amendment. This court permanently enjoins and restrains the CFTC from requiring Geldermann to arbitrate the FSI claims.

ENTER:

/s/ JAMES F. HOLDERMAN
JAMES F. HOLDERMAN
United States District Judge

DATED: 12-30-86

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

GELDERMANN, INC.
Plaintiff

v. Case Number: 85 C 7350

BOARD OF TRADE OF THE CITY OF CHICAGO, etc., et al.
Defendants

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Regulation 7.201 and CBT Rule 620.01(B), as applied to Geldermann in this case, violate the Seventh Amendment. This Court permanently enjoins and restrains the CFTC from requiring Geldermann to arbitrate the FSI claims.

December 30, 1986
Date

H. STUART CUNNINGHAM
Clerk

/s/ KATHLEEN BRANCH
(By) Deputy Clerk

Supreme Court, U.S.
FILED
JUN 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2) (2)

Nos. 87-1584 and 87-1663

In the Supreme Court of the United States

OCTOBER TERM, 1987

GELDERMANN, INC., PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

BOARD OF TRADE OF CITY OF CHICAGO, PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

1. Whether the Commodity Futures Trading Commission exceeded its statutory authority or acted arbitrarily in adopting a rule requiring the members of the Board of Trade of the City of Chicago to arbitrate customers' claims at the customers' option.

2. Whether Section 5a(11) of the Commodity Exchange Act, 7 U.S.C. 7a(11), which requires regulated futures contract markets to provide customers of members the option of pursuing fair and equitable procedures for the arbitration of claims against a member, violates Article III of the Constitution or the Seventh Amendment.

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COMMODITY FUTURES TRADING COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (87-1584 Pet. App. 1-26) is reported at 836 F.2d 310. The opinion of the district court (87-1584 Pet. App. 27-38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1987. The petitions for a writ of certiorari were filed on March 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Commodity Exchange Act, 7 U.S.C. (& Supp. IV) 1 *et seq.* (CEA or Act), governs trading in futures contracts on "boards of trade," which are "exchange[s] or association[s] * * * engaged in the business of buying or selling any commodity or receiving the same for sale on consignment" (7 U.S.C. 2). The Act declares that transactions in commodity futures contracts "are affected with a national public interest" (7 U.S.C. 5). Accordingly, the Act gives the Commodity Futures Trading Commission (CFTC or Commission) the power to designate as "contract markets" boards of trade that satisfy certain requirements, and provides generally that commodity futures transactions in the United States may be executed lawfully only on contract markets and only through members of those markets. See 7 U.S.C. 6(a), 7, 8. The Commission oversees the operation of contract markets and has the authority to bring an administrative proceeding to suspend "all trading privileges" of, and otherwise sanction, any person who violates the Act or the Commission's regulations (7 U.S.C. 9).

The Act imposes certain duties on designated contract markets and their members. One of a contract market's duties, imposed by Section 5a(11) of the Act (7 U.S.C. 7a(11) (emphasis in original)), is to:

> [p]rovide a fair and equitable procedure through arbitration or otherwise * * * for the settlement of customers' claims and grievances against any member or employee thereof: *Provided,* That (i) the use of such procedure by a customer shall be voluntary and (ii) the term "customer" as used in this paragraph shall not include another member of the contract market * * *.[1]

[1] The Act also provides a reparations procedure through which customers of commodity brokers may seek redress for the brokers' violations of the Act or the Commission's rules. See 7 U.S.C. 18. The

After Section 5a(11) was enacted, all 11 exchanges designated as contract markets submitted to the Commission for its approval proposed rules providing for arbitration of customers' claims against their members. Alone among the 11, petitioner Board of Trade of the City of Chicago (Board of Trade) submitted a proposed rule that did not give customers an absolute right to have their claims arbitrated; instead, the rule gave members of the Board of Trade the choice whether to agree to arbitration. The Board of Trade was thus the only futures market of the 11 markets then in existence not to adopt a rule requiring members to arbitrate claims by their customers. 87-1584 Pet. App. 4.

Under Section 8a(7) of the Act (7 U.S.C. 12a(7)), the CFTC is authorized "to alter or supplement the rules of a contract market * * * for the protection of traders or to insure fair dealings * * *." The CFTC asked the Board of Trade to amend its rule to require that its members submit customer claims to arbitration when the customer requests it. The Commission explained that such an amendment was required by Section 5a(11) of the Act—*i.e.*, that the section was intended to give the option to seek arbitration to the customer, not to the member of a contract market. The Board of Trade, however, refused to amend its proposed rule. Therefore, the CFTC, acting pursuant to Section 8a(7) of the Act, adopted Rule 7.201 (17 C.F.R. 7.201), which requires members of the Board of Trade to enter into arbitration of their customers' claims when the customer invokes arbitration. 87-1584 Pet. App. 5.[2]

Commission is assigned the task of administering this procedure, which was described by this Court in *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 2, as an "alternative to existing fora available to aggrieved customers, namely, the courts and arbitration."

[2] The Board of Trade immediately sought judicial review of Rule 7.201 on the ground that it deprived members of the Board of Trade of their Seventh Amendment right to a jury trial. The Seventh Circuit

2. Petitioner Geldermann, Inc., a commodity brokerage firm, is registered with the CFTC and is a member of the Board of Trade. In April 1985, FSI Futures, Inc. (FSI) initiated an arbitration proceeding against Geldermann. FSI claimed that Geldermann did not properly fill one of FSI's orders. Geldermann did not contest FSI's right to arbitration, and a Board of Trade arbitration panel awarded $54,718 to FSI. Soon thereafter, Geldermann notified FSI that it was terminating FSI's account. 87-1584 Pet. App. 19.

In May 1985, FSI again sought to arbitrate claims against Geldermann. FSI asserted claims for losses suffered in transferring its positions from Geldermann, and for interest allegedly due as a result of Geldermann's late payment of the first arbitration award. This time, Geldermann opposed FSI's arbitration demand. To avoid penalties for noncompliance with the rule requiring members to arbitrate customers' claims, Geldermann filed this action for an injunction against the CFTC and the Board of Trade. 87-1584 Pet. App. 19.[3]

3. The district court granted Geldermann's motion for summary judgment and permanently enjoined the CFTC from requiring Geldermann to arbitrate FSI's claims (87-1584 Pet. App. 39). The court held that the Commis-

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dismissed that action as not ripe. See *Board of Trade* v. *CFTC*, 704 F.2d 929 (1983). The court noted that the validity of the CFTC's rule could be tested by a member bringing suit to enjoin an arbitration proceeding demanded by a customer. See *id.* at 933. The Board of Trade published this dictum in a footnote to its rules. See 87-1584 Pet. App. 2-3.

[3] Geldermann's action against the Commission was brought under the Administrative Procedure Act (5 U.S.C. (& Supp. IV) 701 *et seq.*). Although the Board of Trade was named as a defendant, the Board of Trade supported Geldermann's position. In the court of appeals, therefore, the Board of Trade was aligned with Geldermann as an appellee (87-1584 Pet. App. 1).

sion's rule requiring members of the Board of Trade to submit to arbitration (17 C.F.R. 7.201) violated Geldermann's Seventh Amendment right to a trial by jury (87-1584 Pet. App. 33).[4] The district court further held that Geldermann had not waived its Seventh Amendment rights even though Geldermann, in becoming a member of the Board of Trade, agreed to abide by the Board of Trade's rules (*id.* at 35).

The court of appeals reversed. The court first ruled that the CFTC had reasonably concluded that Section 5a(11) of the Act compels designated contract markets to have rules requiring members to arbitrate claims at a customer's request (87-1584 Pet. App. 10-11). The court of appeals then rejected Geldermann's Article III challenge to Section 5a(11). The court, citing this Court's decision in *CFTC* v. *Schor,* No. 85-621 (July 7, 1986), considered the two main purposes served by Section 1 of Article III: to safeguard a litigant's personal right to have claims decided by judges with life tenure and other protections, and to protect the role of the judiciary within our constitutional scheme of tripartite government (87-1584 Pet. App. 11-25).

The court of appeals cited this Court's decisions in *Thomas* v. *Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985), and *CFTC* v. *Schor, supra,* and held that Geldermann had waived any personal right it might have had to an Article III forum (87-1584 Pet. App. 21). The court noted that Geldermann signed an agreement to abide by the Board of Trade's regulations; one of those regulations is the requirement that members must arbitrate claims at a customer's request (*id.* at 15). The court of appeals rejected Geldermann's claim that its consent was not voluntary.

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[4] The district court ruled that Commission Rule 7.201 was not mandated by Section 5a(11) of the Commodity Exchange Act. Thus the court considered the constitutionality of Rule 7.201, not Section 5a(11) (87-1584 Pet. App. 32).

The court observed that Geldermann was not compelled to become a member of the Board of Trade, and that Geldermann could preserve any right to an Article III court "by resigning its membership" (*id.* at 18 n.9.). The court also noted that Geldermann willingly consented to the first arbitration with FSI, which showed that Geldermann was "content to have [its] disputes settled by a non-Article III forum until [it] lost" (*id.* at 21).[5]

The court of appeals next ruled that Section 5a(11) of the Act does not exceed the non-waivable structural limits that Article III places on Congress (87-1584 Pet. App. 21-25). The court reached this conclusion by comparing this case to *CFTC* v. *Schor, supra,* in which the Court rejected an Article III challenge to the adjudication of common law counterclaims in connection with the reparation procedures under the CEA. The court of appeals stated that this Court would likely view the congressional scheme of allowing commodity futures customers the option of electing arbitration "as intruding on the province of the judiciary even less than the reparations procedure challenged in *Schor*" (87-1584 Pet. App. 23).

Finally, the court of appeals rejected Geldermann's contention that it has a Seventh Amendment right to a jury trial on FSI's claims (87-1584 Pet. App. 26). Citing *Atlas Roofing Co.* v. *OSHRC,* 430 U.S. 442, 449-461 (1977), and *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 48-49 (1937), the court of appeals stated that the Seventh Amendment "simply does not apply" in a non-Article III forum (87-1584 Pet. App. 26). Because Geldermann was not en-

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[5] In this respect, the court of appeals compared Geldermann to the respondent in *CFTC* v. *Schor, supra,* who objected to adjudication of common law claims in an administrative proceeding under the CEA only after adjudication of those claims: "Schor and Geldermann were content to have their disputes settled by a non-Article III forum until they lost" (87-1584 Pet. App. 21).

titled to an Article III forum, the court concluded that "the Seventh Amendment is not implicated" in this case (*ibid.*).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. The Board of Trade argues (87-1663 Pet. 10-14) that the Commission exceeded its authority or acted arbitrarily in adopting Rule 7.201, which requires members of the Board of Trade to enter into arbitration of a customer's claim whenever the customer chooses that forum. The Commission's rule, however, is in full accord with the language and purpose of the relevant provision of the CEA.[6]

Section 5a(11) of the CEA states that "[e]ach contract market *shall* * * * [p]rovide a fair and equitable procedure through arbitration or otherwise * * * for the settlement of customers' claims and grievances against any member or employee thereof: *Provided,* That (i) the use of such procedure by a customer shall be voluntary * * * " (7 U.S.C. 7a(11) (emphasis added)). The purpose evident in this language is to give customers of a member of a contract market the right, at their option, of arbitrating claims against the member. For that congressionally mandated option to be meaningful, members of a contract market must be required to submit to arbitration of claims at a customer's request.[7]

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[6] Of course, under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 845 (1984), unless the text of the statute and its legislative history conclusively resolve the question of interpretation *against* the Commission, the Commission's consistent interpretation of the CEA must be upheld if it is "a reasonable one."

[7] The statute (7 U.S.C. 7a(11)) requires the contract market to provide a fair procedure "through arbitration or otherwise." No one has

The legislative and administrative history of the provision is wholly consistent with this interpretation. When the Senate was considering in 1974 the bill that contained Section 5a(11), two representatives of the Board of Trade objected to the bill on the ground that it gave the customer, but not the member of a contract market, the option to avoid arbitration. *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry,* 93d Cong., 2d Sess. 524, 526 (1974). Congress passed the law over those objections. The Commission has consistently interpreted Section 5a(11) to give the customer the right to choose arbitration. See 41 Fed. Reg. 27526 (1976). In 1983, Congress amended Section 5a(11) in the Futures Trading Act of 1982, Pub. L. No. 97-444, § 217(a), 96 Stat. 2307. The House Committee Report noted at that time that the amendment did "not affect the existing requirement that the use of arbitration by the customer is voluntary or the Commission's understanding that exchange members must participate in arbitration proceedings which the customer has elected to pursue" (H.R. Rep. 97-565, 97th Cong., 2d Sess. Pt. 1, at 56 (1982)). It is clear, therefore, that the Commission did not exceed its statutory authority or act arbitrarily in adopting Rule 7.201.

2. Petitioners' principal contention (87-1584 Pet. 18-19; 87-1663 Pet. 14-19) is that Section 5a(11) of the CEA is unconstitutional because it deprives members of contract markets of a supposed "personal right" to have customers' claims against them adjudicated in an Article III forum.

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suggested that the words "or otherwise" alter the issue in this case. Whatever latitude those words may allow for a fair procedure that involves processes other than arbitration, they do not allow the market to select arbitration as the "fair and equitable procedure" and then make members' participation voluntary, as the Board of Trade attempted here.

But the claim as articulated by petitioners is plainly wrong; they have neither a statutory nor a constitutional right to be proceeded against in an Article III court. Petitioners stress (87-1584 Pet. 11-12; 87-1663 Pet. 20), that FSI's claims are essentially state common law claims sounding in "contract, debt and conversion" (87-1584 Pet. App. 33). Geldermann clearly has no *constitutional* right to have such claims adjudicated in a federal court. Indeed, because Geldermann is an Illinois citizen (*id.* at 22 n.11), if FSI had asserted state-law claims in an Illinois court, Geldermann could not have removed the action to a federal court even though there apparently is diversity of citizenship. See 28 U.S.C. 1441(b).

Petitioners' real contention, not articulated below or in the petitions, is that members of regulated futures markets have a constitutional right (perhaps grounded in the Due Process Clause) to insist that customers' claims against them be resolved by some judicial process and to refuse to resolve them through arbitration. That claim is wrong. The arbitration process itself, conducted under rules adopted by a board of trade, is obviously not inherently unfair to members. Cf. *Prima Paint Corp.* v. *Flood & Conklin Mfg.*, 388 U.S. 395 (1967) (upholding constitutionality of the federal Arbitration Act). And Congress may constitutionally require boards of trade to afford arbitration if it deems that appropriate to protect customers by providing an efficient remedy for their claims.

In *Thomas* v. *Union Carbide Agricultural Prods. Co.*, *supra*, the Court considered the constitutionality of the arbitration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. (& Supp. IV) 136 *et seq.* (FIFRA)). Under that statute, a manufacturer must register its pesticides with the Environmental Protection Agency. To obtain a registration, the manufacturer must submit a large amount of data to the agency. As part of the process,

the submitting manufacturer agrees that subsequent registrants may rely on its data when they register their pesticides, and it agrees to accept compensation for this use as determined (in the absence of an agreement) by arbitration. Follow-on registrants, in turn, agree to pay compensation, determined by an arbitrator, for using an earlier registrant's data. Hence, consent to arbitration is a condition to registering a pesticide for sale and to gaining the benefits of an earlier registrant's data. In upholding this scheme, the Court noted that Congress has the power under Article I of the Constitution "*to condition* issuance of registrations or licenses on compliance with agency [arbitration] procedures" (473 U.S. at 589 (emphasis added)), and that "the follow-on registrant * * * explicitly consents to have his rights determined by arbitration" (*id.* at 592). See also *Schor,* slip op. 15-16 (one who seeks relief in a CFTC reparations proceeding validly waives, in return for the benefits of that procedure, the right to insist that a common law counterclaim be brought in an Article III court).

A member's consent to the arbitration of customer claims is likewise a reasonable condition of membership in a regulated futures market. Some 65 years ago the Court noted that the "Board of Trade conducts a business which is affected with a public interest and is, therefore, subject to reasonable regulation in the public interest." *Board of Trade* v. *Olsen,* 262 U.S. 1, 40-41 (1923). Congress has conferred a very special status on members of the Board of Trade and other regulated contract markets: the Act requires (see page 2, *supra*) that all trading in futures contracts be conducted through members of such markets. Congress imposed that requirement in order to permit "careful supervision of those transactions in the national public interest" (*Olsen*, 262 U.S. at 41). Accordingly, under the CEA, anyone who wishes to trade in commodity futures contracts must have its trades "executed or consummated by or

through a member of [a] contract market" (7 U.S.C. 6(a)(2)). Having th s placed members in the neck of the bottle, Congress could surely provide that members must, through their self-regulatory organizations, provide a just and efficient means of resolving customer claims. See generally *Nelson* v. *Secretary of Agriculture,* 133 F.2d 453, 456 (7th Cir. 1943) (member firm is permitted "to engage in a business affected with the national public interest in which * * * [it] may participate only upon compliance with conditions imposed by Congress in the exercise of its power over commerce").

Geldermann chose to have the economic and other benefits of being a member of a federally regulated futures contract market.[8] Those benefits flow, in part, from government regulation itself, which gives investors confidence in the integrity of contract markets, the honesty of their members, and (not incidentally) the availability of remedies for the misconduct of members.[9] Such membership is not essential to engage in the business of trading in futures contracts; indeed, FSI is a "futures commission merchant" under the Commodity Exchange Act[10] but not a member of the

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[8] That choice, and Geldermann's agreement to be bound by the Board of Trade's arbitration rule (87-1584 Pet. App. 15), led the court of appeals to conclude that Geldermann "waived" any personal right to an Article III forum. The court meant, as we read its opinion, only that Congress may provide that those who choose to be members of a regulated futures market must agree to an efficient and fair procedure for resolution of customer claims.

[9] Geldermann's president noted that membership in a regulated market is "reassuring to significant commercial customer entities" (87-1584 Pet. App. 45).

[10] A "futures commission merchant" is any person that solicits or accepts "orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property * * * to margin, guarantee,

Board of Trade (87-1584 Pet. App. 29). But Congress has determined that those firms, like Geldermann, that seek and obtain membership in a designated contract market, and thus join the select group through which others must deal, should agree to submit to fair and equitable arbitration of customers' claims in order to permit their efficient resolution.[11] That congressional determination has the same rational and constitutional bases as the determination that those who choose to participate in the FIFRA registration process (*Thomas*) or those who seek reparations from the CFTC (*Schor*) must thereby agree to non-Article III resolution of certain claims against them. Cf. *Shearson/American Express Inc.* v. *McMahon,* No. 86-44 (June 8, 1987), slip op. 17 (enforcing agreement to arbitrate claims under the Securities Exchange Act in light of SEC's "statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights").

3. Petitioners also argue that Section 5a(11) and the Commission's arbitration rule violate the "structural" principle of Article III (87-1584 Pet. 19; 87-1663 Pet. 22-25),

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or secure any trades or contracts that result or may result therefrom" (7 U.S.C. 2). It is unlawful for any person to act as a futures commission merchant unless he is registered as such with the Commission. See 7 U.S.C. 6d(1).

[11] This Court has consistently respected Congress's decisions to encourage or compel arbitration of claims. In *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), the Court said that the Arbitration Act (9 U.S.C. 1 *et seq.*) manifests a "liberal policy favoring arbitration agreements." This "policy requires that [the Court] rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc.* v. *Byrd,* 470 U.S. 213, 221 (1985). Indeed, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability" (*Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25 (footnote omitted)).

but they fundamentally misunderstand that principle. In *Schor,* the Court articulated it as follows: "Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts '*to transfer jurisdiction to non-Article III tribunals* for the purpose of emasculating' constitutional courts, and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other' " (*Schor*, slip op. 16 (citations omitted; emphasis added)). Later in *Schor,* the Court said that Congress risks violating this principle when it "encroache[s] on the federal judiciary" by allocating matters traditionally tried before an Article III court "*to a non-Article III forum of its own creation*" (*id.* at 20 (emphasis added)).[12]

This case involves no transfer of any part of the judicial power to a non-Article III federal forum. Arbitration under procedures established by the Board of Trade is an essentially private dispute resolution mechanism. Arbitrators are privately appointed; under the Board of Trade's rules, the customer has the option of selecting a panel composed of persons associated with the Board of Trade (*e.g.*, traders and brokers) or a panel with a majority of members who are not connected with the Board of Trade. In either case, the arbitrators are not officers of any branch of the federal government, and they do not exercise government power. Their function is not to adjudicate but to resolve disputes without adjudication. Cf. *McDonald* v. *City of West Branch,* 466 U.S. 284, 291 (1984) ("arbitral factfinding is generally not equivalent to judicial factfinding"). In sum, Congress has not "encroached on the federal judiciary" by transferring part of the judicial power "to a non-Article III

[12] In *Thomas,* the Court described *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), as holding "only that Congress may not *vest in a non-Article III court the power to adjudicate*" certain kinds of claims without the consent of the litigants (473 U.S. at 584 (emphasis added)).

forum of its own creation" (*Schor,* slip op. 20); Congress has merely required that members of futures markets agree to afford an essentially private dispute resolution mechanism for customer claims arising out of transactions regulated under the CEA. Since members may constitutionally be required to resolve customer claims in that manner (see pages 8-12, *supra*), the Article III courts have not been deprived of anything that is rightfully theirs.[13]

4. Geldermann also argues (87-1584 Pet. 10-17) that it has a Seventh Amendment right to a jury trial on FSI's claims. As the court of appeals recognized (87-1584 Pet. App. 26), however, this argument is foreclosed by the fact that FSI validly invoked its statutory right to select a non-Article III forum.

In *Tull* v. *United States,* No. 85-1259 (Apr. 28, 1987), slip op. 5 n.4, this Court recently noted that "the Seventh Amendment is not applicable to administrative proceedings" because of "the practical limitations of a jury trial" and a jury trial's incompatibility "with proceedings outside of traditional courts of law." This comment in *Tull* was essentially a restatement of the holding of *Block* v. *Hirsh,* 256 U.S. 135 (1921), which "stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." *Pernell* v. *Southall Realty,* 416 U.S. 363, 383 (1974).

Arbitration, of course, is equally incompatible with jury trials. The very purpose of arbitration is to provide an efficent decision-making process without the complex procedures attendant to traditional court litigation. Accordingly, it follows from the fact that Congress may give

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[13] Congress has not, of course, attempted to "withdraw from judicial cognizance" (*Schor,* slip op. 20) the entire subject matter of customer claims; it has simply given the customer the option of invoking arbitration.

customers of members of contract markets the option of asserting claims against those members in arbitration, that the Constitution does not guarantee members a right to a jury trial on such claims. The cases cited by petitioners (87-1584 Pet. 11; 87-1663 Pet. 20) do not hold otherwise. They simply stand for the proposition that Geldermann might have had a right to a jury trial had FSI brought its claims in a federal court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60516